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IN THE

Supreme Court of the United States

THOMAS D. ARTHUR,

Petitioner,

—v.—

RICHARD F. ALLEN,
Commissioner, Alabama Department of Corrections,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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January 11, 2007

CAPITAL CASE

Questions Presented for Review

1. Whether the courts below erred in denying a petitioner sentenced to death any opportunity to develop a gateway claim of actual innocence through which he seeks collateral review of his *first* federal habeas petition that has never been reviewed on the merits where: (i) if the facts are fully developed, petitioner may be able to demonstrate that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence; (ii) a hearing is indispensable to the fair and accurate assessment of the reliability of alibi witnesses whose testimonies are crucial to petitioner's showing of actual innocence; (iii) physical evidence, including a rape kit and blood-stained clothing, has never been subjected to DNA testing; (iv) testing physical evidence could discredit entirely the State's primary witness, a convicted felon and admitted perjurer, whose testimony was the only direct evidence linking petitioner to the crime; and (v) petitioner's allegations in support of his discovery request are consistent with such witness' previous sworn testimony that petitioner did not commit the crime.

2. Whether statutory tolling pursuant to the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") is warranted where: (i) no state or federal post-conviction court has ever reviewed on the merits the claims raised by a petitioner sentenced to death; (ii) the State failed to provide petitioner adequate access to courts; (iii) the State required death row inmates to request books from the prison law library specifically by volume or title, without providing any index or description of available books or any opportunity to browse through materials before requesting books; and (iv) the State did not provide any legal assistance or counsel for purposes of preparing an initial post-conviction petition.

3. Whether a different equitable tolling standard should apply to a petitioner who stands to be executed without ever having received any collateral review of his conviction and death sentence and who diligently pursued his rights, where petitioner also: (i) was denied any opportunity to develop his claim of actual innocence; (ii) did not have meaningful access to adequate law library facilities; (iii) did not have access to any legal assistance or counsel to assist in preparing a post-conviction petition; (iv) was prevented by the State from meeting with persons who might have been able to assist him; and (v) did not receive notice that the certificate of judgment in his direct appeal had been entered and therefore did not know that the limitations period for filing a state post-conviction petition had begun to run.

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Petitioner Thomas D. Arthur, an indigent inmate sentenced to death, respectfully petitions for a writ of certiorari to review the decisions of the United States Court of Appeals for the Eleventh Circuit, dated June 21, 2006 and August 14, 2006, affirming the judgment of the United States District Court for the Northern District of Alabama, dated December 4, 2002.[1]

OPINIONS BELOW

The district court's memorandum of opinion is unreported and reprinted in the appendix hereto at pages A1–24. The district court's memorandum of opinion denying Mr. Arthur's motion to alter or amend judgment is unreported and reprinted at pages A25–33. The Eleventh Circuit's decision is reported at 452 F.3d 1234 and reprinted at pages A34–61. The Eleventh Circuit's decision on petition for rehearing is reported at 459 F.3d 1310 and reprinted at pages A62–64.

JURISDICTION

The district court entered its memorandum of opinion on December 4, 2002. The district court entered its memorandum of opinion denying Mr. Arthur's motion to alter or amend judgment on June 4, 2003. The court of appeals' decision was entered on June 21, 2006. The court of appeals' decision on petition for rehearing was entered on August 14, 2006. On September 21, 2006, Justice Thomas extended the time for filing a petition for writ of certiorari to January 11, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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[1] Mr. Arthur is not proceeding *in forma pauperis* because pro bono counsel have volunteered to pay the filing fee on his behalf.

STATUTE INVOLVED

28 U.S.C. § 2244(d)(1) provides in relevant part:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
>
> * * *
>
> (B) the date on which the impediment to the filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action
>
> * * *

STATEMENT OF THE CASE

A. Relevant Facts

On February 1, 1982 at 9:12 a.m., the police responded to a call at the Wicker residence in Muscle Shoals, Alabama, where they found Judy Wicker lying on the floor with traces of blood on her face and her sister Teresa Rowland kneeling beside her. (R.1-22-T.R. 310–11, 322, 337–42)[2] The police also found Troy Wicker's body in the bedroom with a single gunshot wound to the right eye. (R.1-22-T.R. 318–20)

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[2] This was Mr. Arthur's third trial on the same charges. His two previous trials resulted in convictions and death sentences, which were overturned on direct appeal as a result of constitutional violations. The record of Mr. Arthur's third state trial is attached to the State's Amended Answer. (R.1-22) "T.R. ___" denotes references to the reporter's trial transcripts, and "C.R. ___" denotes references to the clerk's record.

The police collected physical evidence from the crime scene, including Judy Wicker's blood-stained clothing and torn undergarment (R.1-22-T.R. 365–66), vacuum sweepings, hair samples (R.1-22-T.R. 368), shell casings (R.1-22-T.R. 363–64), and a pillowcase with gunpowder flakes (R.1-22-T.R. 367). The police also dusted the area for latent fingerprints (R.1-22-T.R. 368) but did not search Judy Wicker, her sister, or any of their possessions (R.1-22-T.R. 383–85). The police located Judy Wicker's 1981 Buick Riviera, which had been abandoned in a parking lot; the police searched it and found a wig, hair samples, and latent fingerprints. (R.1-22-T.R. 370–71) The murder weapon was never recovered. (R.1-22-T.R. 352)

After the shooting, Judy Wicker was taken to the hospital and remained there for several days. (R.1-22-T.R. 776) She suffered "a bruise around her left eye, a laceration of her left upper lip, two chipped teeth, and an abrasion on her left hip." *Wicker* v. *Alabama*, 433 So. 2d 1190, 1192–93 (Ala. Crim. App. 1983). Moreover, a rape kit was prepared and seminal fluid collected. (A65, A70) In response to questioning by investigators at the hospital, Judy Wicker provided the following account of the crime: She returned home after dropping her children off at school. *Wicker*, 433 So. 2d at 1194. When she entered her house, she found an African-American man burglarizing her home. *Id.* at 1192, 1194. The intruder raped her, knocked her unconscious, and then shot Troy Wicker. *Id.* at 1194.

Judy Wicker was eventually charged with her husband's murder under the theory that she killed him to collect approximately $90,000 in life insurance proceeds. (R.1-22-T.R. 831) At her trial in 1982, she testified under penalty of perjury to the same version of events that she had related to the investigators. *Wicker*, 433 So. 2d at 1192–94. Despite her claims of innocence, Judy Wicker was convicted

of murdering her husband and was sentenced to life imprisonment. (R.1-22-T.R. 794–95)

At Mr. Arthur's trial in 1991,[3] Judy Wicker gave a completely different account of the murder. (R.1-22-T.R. 787) Although she previously had sworn under oath that Mr. Arthur was not involved in the murder of her husband, she now claimed that she, along with Teresa Rowland and her sister's boyfriend, Theron McKinney, had decided to kill Troy Wicker, and that she had paid Mr. Arthur to pull the trigger. (R.1-22-T.R. 776, 781, 800) She also paid Rowland $6,000 and gave McKinney jewelry and a Trans Am in exchange for their assistance in carrying out the murder. (R.1-22-T.R. 780) The State of Alabama, however, never prosecuted Rowland or McKinney.[4]

At the time she testified against Mr. Arthur, Judy Wicker was serving a life sentence for the same crime. In return for her testimony, the state prosecutor, Gary Alverson, promised to make a parole recommendation on her behalf.

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[3] The trial court permitted Mr. Arthur to represent himself. Although the court was aware that Mr. Arthur's decision was the result of his intense frustration with his lawyer's lack of communication and attention to his case, the court granted Mr. Arthur's request without first conducting an inquiry to ensure that he voluntarily and knowingly waived his rights.

[4] The failure of the State to pursue the investigation and prosecution of these two suspects is particularly troublesome considering that Teresa Rowland had her own reasons for wanting Troy Wicker dead. She had previously hired Troy Wicker to burn her house down so that she could collect insurance proceeds; however, she was unable to pay him the promised amount, so he had threatened to have her arrested for arson. (R.1-22-T.R. 799–800) Rowland also had the opportunity to murder Troy Wicker—she had her own key to the Wicker residence and was free to come and go as she pleased. (R.1-22-T.R. 763) Most significantly, Rowland was present at the Wicker house on the morning of the murder. (R.1-22-T.R. 321–22)

(R.1-22-T.R. 823–26, 830–31) Prior to becoming a state prosecutor, Alverson had represented Judy Wicker and assisted her in procuring a deal from the then-prosecutor in exchange for her testimony. (R.1-22-T.R. 825–27) Thus, the state prosecutor—who had an unavoidable conflict of interest because of his prior representation of Judy Wicker—offered her the ultimate deal: assist in the prosecution of Mr. Arthur and obtain early parole.

Although no physical evidence linked Mr. Arthur to the murder of Troy Wicker, he was convicted and sentenced to death for this crime. The hair samples and fingerprints found at the crime scene and in Judy Wicker's 1981 Buick Riviera were tested, but they did not match Mr. Arthur's. (R.1-22-T.R. 379) Mr. Arthur's conviction was based almost exclusively on the testimony of Judy Wicker, a convicted murderer and admitted perjurer.[5]

The penalty phase that followed lasted less than an hour and a half. (R.1-22-T.R. 1165, 1236) Mr. Arthur's co-counsel offered no mitigation testimony and introduced only a handful of exhibits relating to Mr. Arthur's good behavior

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[5] The circumstantial evidence introduced to support Judy Wicker's story was weak. Officer Lang testified that he observed Judy Wicker driving past a school crossing twice prior to 8 a.m. This testimony just as credibly supported her initial story that an unknown intruder had raped her in her home and killed her husband. Pat Halliday testified regarding Mr. Arthur's possession of a large amount of money after the murder, but this testimony was also consistent with evidence that Mr. Arthur had won money in a poker game. Debra Philips testified merely that Mr. Arthur threw a garbage bag into the Tennessee River. Patricia Green's testimony that she provided Mr. Arthur with .22 caliber bullets and that Mr. Arthur told her he was going to kill someone with them was called into question when Ronald Spears testified that Green lied as a result of being threatened. Moreover, the State's criminologist was unable to match such bullets with the spent shell casings recovered from the crime scene.

in prison prior to 1981, which he had obtained from the record on appeal from one of Mr. Arthur's previous trials. (R.1-22-T.R. 1168) In a lengthy summation, Mr. Arthur urged the jury to recommend a death sentence and repeatedly guaranteed that he would never be executed because both his conviction and death sentence would be reviewed and reversed on appeal. (R.1-22-TR. 1181) He then informed the jury that he had been convicted and sentenced to death twice before in this case by two other juries. (R.1-22-T.R. 1188)

B. Post-Conviction Proceedings

Throughout post-conviction proceedings, Mr. Arthur diligently tried to develop facts relating to his gateway claim of actual innocence and tolling claims, but he faced insurmountable obstacles at every turn.[6] For example, he sought access to the trial exhibits but was informed that an order from the state trial judge would be required. Mr. Arthur accordingly filed such a motion. Instead of ruling on this motion, the trial judge transferred the exhibits to the federal habeas judge, who denied Mr. Arthur's request by order dated April 30, 2002. (R.1-29)

Similarly, Mr. Arthur filed a motion on June 3, 2002 requesting discovery limited to facts relating to his gateway claim of actual innocence. (R.1-33) He sought to conduct tests that had never been performed on various pieces of physical evidence. *Id.* To substantiate his claim of innocence and further demonstrate the need for discovery, Mr. Arthur submitted affidavits from two alibi witnesses, Alphonso High and Ray Melson, who stated that they had seen Mr. Arthur on the morning of Troy Wicker's murder.

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[6] In July 1991, Mr. Arthur's trial counsel filed a "Motion to Inspect, Examine and Test Physical Evidence." (R.1-22-C.R. 61)

(A71 ¶ 3; A79 ¶ 1) The State of Alabama submitted countering affidavits from these witnesses. (A73; A81) Consequently, Mr. Arthur sought a hearing to explore the questionable circumstances under which they executed these new affidavits, including the bases for Mr. High's statement that he did not want to be "carried away" in handcuffs (A78 ¶ 6), and Mr. Melson's statement that he was answerable only to an assistant attorney general representing the State (A90 ¶ 20).

In spite of the clear need for discovery and a hearing, the district court denied Mr. Arthur's requests, rejected his statutory and equitable tolling claims, and dismissed his petition as time-barred on December 4, 2002. (A23–24) Mr. Arthur timely moved to alter or amend judgment on December 18, 2002 (R.1-57), which was denied on June 4, 2003 (A25–26). Mr. Arthur applied for a certificate of appealability on August 6, 2003 (R.1-65), which was granted in its entirety by the district court on August 11, 2003 (R.1-66).

The Eleventh Circuit affirmed. With respect to Mr. Arthur's requests for a hearing and discovery, the appellate court upheld the district court's finding that Mr. Arthur failed to satisfy the due diligence requirement of Section 2254(e)(2) of AEDPA. (A52) Mr. Arthur timely filed a petition for rehearing and rehearing en banc on July 11, 2006, arguing *inter alia*, that the due diligence requirement of Section 2254(e)(2) does not apply to his gateway claim of actual innocence.

On August 14, 2006, the Eleventh Circuit denied Mr. Arthur's petition for rehearing and rehearing en banc but also modified its discussion regarding his requests for a hearing and discovery. (A62–64) Specifically, the Eleventh Circuit recognized that the "provisions of 28 U.S.C.

§ 2254(e)(2) for obtaining an evidentiary hearing are not applicable to a petitioner's first federal habeas petition seeking review of a defaulted claim based on an allegation of actual innocence." (A63 n.1) Instead of remanding to the district court, who erroneously applied Section 2254(e)(2) in denying Mr. Arthur's request for a hearing, the Eleventh Circuit determined that Mr. Arthur's alibi witnesses were not credible. (A63)

REASONS FOR GRANTING THE PETITION

I. Mr. Arthur Is Entitled to a Hearing and Discovery to Develop His Gateway Claim of Actual Innocence.

As this Court has recognized, the "[d]ismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar* v. *Thomas*, 517 U.S. 314, 324 (1996). Mr. Arthur—who faces execution without ever having received any state or federal post-conviction review of his trial and death sentence—seeks to develop further his gateway claim of actual innocence through which he "must pass to have his otherwise barred constitutional claims considered on the merits." *Schlup* v. *Delo*, 513 U.S. 298, 315 (1995) (quoting *Herrera* v. *Collins*, 506 U.S. 390, 404 (1993)).

Unlike a substantive claim of innocence, a gateway claim of actual innocence is "procedural" and "does not by itself provide a basis for relief." *Schlup*, 513 U.S. at 314–15. The "evidence of innocence" for a gateway claim therefore carries "less of a burden;" instead of being subject to a "clear and convincing" standard, a petitioner at the gateway stage "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new

evidence." *Id.* at 316, 327. "The paramount importance of avoiding the injustice of executing one who is actually innocent" merits application of a less exacting standard. *Id.* at 326. By failing to correctly apply *Schlup* and its progeny to Mr. Arthur's requests for a hearing and discovery, the courts below improperly denied Mr. Arthur any opportunity to develop his gateway claim of actual innocence.

A. A Hearing Is Warranted to Examine Mr. Arthur's Alibi Witnesses.

In determining whether to grant an evidentiary hearing, courts "must assess the probative force of the newly presented evidence in connection with the evidence of guilt adduced at trial." *Id.* at 332. Courts may "consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability" of the new evidence of innocence. *Id.* As *Schlup* made clear, however, a delay in presenting exculpatory witness statements is not dispositive of their credibility. *See id.* at 331 (rejecting appellate court's reasoning that the actual innocence standard was not met because of "the eleventh-hour nature of the information").

Mr. Arthur has presented powerful evidence of his innocence. In their original affidavits, both Mr. High and Mr. Melson, independently and without communicating with each other, provided specific, consistent details about Mr. Arthur's visit on the morning of Troy Wicker's murder. (A91 ¶ 23) Both were confident in their recollections: Mr. Arthur stopped by Copper Mobile Homes in Decatur some time between 8 a.m. and 9 a.m.; they were on their way to Birmingham to set up a trailer; Mr. Arthur stayed for approximately 30 minutes; he acted like he always did; he was looking for work; the day after Mr. Arthur's visit they heard about Troy Wicker's murder; and when they heard that Mr. Arthur had been arrested they realized that they had seen

him on the morning of the murder. (A71–72 ¶¶ 3–5; A79–80 ¶¶ 1–4)

The recollections of Messrs. High and Melson are significant because they directly contradict Judy Wicker's testimony that Mr. Arthur was with her that morning. (A11) Based on her testimony regarding the events immediately preceding the murder, Mr. Arthur could not have visited Messrs. High and Melson in Decatur and shot Troy Wicker in Muscle Shoals before 9:12 a.m. when the police arrived at the Wicker residence. Indeed, the State of Alabama has not disputed that these original affidavits, if true, establish that Mr. Arthur was nowhere near the Wicker residence when Troy Wicker was murdered.

The State procured its own affidavits from Messrs. High and Melson, who retreated from their original testimonies under questionable circumstances. Mr. Arthur's investigator and counsel met with Mr. High and his assistant, Teresa McDonald, to determine whether Mr. High had been truthful in his initial affidavit. Ms. McDonald stated that two representatives from the State had visited Mr. High, and that one was carrying a gun in his holster. (A77 ¶ 5) Mr. High also expressed concern that he has a family to support and a business to run, and that he did not want to be "carried away" in handcuffs. (A78 ¶ 6) Prior to meeting with State representatives in this case, Mr. High had never voiced any such concerns.

For his part, Mr. Melson, after meeting with State representatives, suddenly insisted that he was on "some strong medication, pain and otherwise" when he signed his original affidavit. (A81) Mr. Melson, however, appeared fully coherent and alert that day. On August 2, 2002, Stephen Gustat, Mr. Arthur's investigator, met Mr. Melson to show him a draft of his affidavit. (A87 ¶ 11) They had

originally agreed to meet at Mr. Melson's home but decided later to meet at Mr. Gustat's hotel. Mr. Gustat offered directions to his hotel but Mr. Melson knew exactly where it was located. (A87–88 ¶ 12) Mr. Melson arrived with Mrs. Melson and they had just come from a tanning salon; Mr. Melson joked that the new bulbs at the salon caused him to burn a little. *Id.*

While in the hotel room, Mr. Melson carefully reviewed the draft affidavit, asked questions, made corrections, and commented on omissions. (A88 ¶¶ 13–14) In particular, Mr. Melson noticed that his last name was spelled incorrectly, that the specific destination of the double-wide trailer, a suburb of Birmingham, was not included in the draft, and that the fact that the trailer had gotten stuck in clay was not mentioned. *Id.* at ¶ 13. During this meeting, Mr. Melson did not exhibit any signs of being under the influence of pain medication and instead complained of back pain. *Id.* at ¶ 11.

Under these circumstances, a hearing is indispensable to the fair and accurate assessment of the reliability of Messrs. High and Melson. Where, as here, a "showing of actual innocence *may* be made out," a district court "should conduct a limited evidentiary hearing at which the affiants whose testimony the court believes to be crucial to the showing of actual innocence are present and may be cross-examined as to veracity, reliability and all of the other elements that affect the weight to be given the testimony of a witness." *Schlup*, 513 U.S. at 341–42 (emphasis added) (Rehnquist, C.J., dissenting).

In rejecting Mr. Arthur's request for a hearing, the Eleventh Circuit stated that the credibility of the original affidavits of Messrs. High and Melson "is fundamentally wounded by the affiants' own substantial retraction of the

very content advanced to support Arthur's new alibi." (A63) In the absence of any hearing, however, the Eleventh Circuit erred in making a credibility determination and disregarding altogether Messrs. High's and Melson's testimonies "crucial to the showing of actual innocence." *Schlup*, 513 U.S. at 341 (Rehnquist, C.J., dissenting). Such a premature determination is particularly unwarranted in light of the detailed affidavits submitted by Mr. Arthur's investigator and counsel highlighting factual questions that could only be resolved by live testimony. *See, e.g., Battle* v. *Delo*, 64 F.3d 347, 352 (8th Cir. 1995) ("If new evidence calls the credibility of certain witnesses into question, and their credibility figures reasonably in our assessment, remand for an evidentiary hearing may be appropriate."); *Murphy* v. *Johnson*, 205 F.3d 809, 816 (5th Cir. 2000) ("[A] petitioner is entitled to an evidentiary hearing only where a factual dispute, if resolved in his favor, would entitle him to relief, and not where a petitioner's allegations are merely conclusory allegations unsupported by specifics.").

Notwithstanding the facts undermining the reliability of the affidavits procured by the State, the Eleventh Circuit concluded that the original affidavits of Messrs. High and Melson "do not furnish good cause to believe that the *facts*, if 'fully developed' through the discovery sought, would be any *different from those found at trial*." (A63) (emphasis added) In making this determination, the court below essentially applied the "sufficiency of the evidence" standard articulated in *Jackson* v. *Virginia*, 443 U.S. 307 (1979), to deny Mr. Arthur's request for a hearing. But *Jackson* has no relevance here. Although "the mere existence of sufficient evidence to convict would be determinative of petitioner's claim" under *Jackson*, "that is not true" under *Schlup*. *Schlup*, 513 U.S. at 330. *Jackson*'s standard "focuses on whether any rational juror could have convicted" and "looks

to whether there is sufficient evidence which, if credited, could support the conviction," but *Schlup*'s "more likely than not" standard considers "what reasonable triers of fact are likely to do" in light of the new evidence. *Id.* In applying *Jackson* instead of *Schlup*, the Eleventh Circuit determined that because Mr. Arthur failed to demonstrate that the evidence at trial was insufficient to support his guilty verdict, the testimony of alibi witnesses cannot demonstrate actual innocence. Thus, the Eleventh Circuit imposed too high a burden by requiring Mr. Arthur to demonstrate *no* jury could have convicted him.

The Eleventh Circuit's application of *Jackson* clearly runs afoul of *Schlup*, which instructs that a "petitioner's showing of innocence is not insufficient solely because the trial record contained sufficient evidence to support the jury's verdict." *Id.* at 331. Under the *Schlup* standard applicable here, Mr. Arthur is entitled to a hearing.

B. Mr. Arthur Has Demonstrated Good Cause for Discovery.

A habeas petitioner is entitled to discovery under the Federal Rules of Civil Procedure for "good cause" shown. RULES GOVERNING § 2254 CASES, Rule 6(a). Where, as here, specific allegations provide reason to believe "that the petitioner *may*, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." *Bracy* v. *Gramley*, 520 U.S. 899, 908–09 (1997) (emphasis added) (quoting *Harris* v. *Nelson*, 394 U.S. 286, 300 (1969)). In denying Mr. Arthur's discovery request seeking to develop further his gateway claim of actual innocence, the courts below misapplied the good cause standard.

In support of his gateway claim, Mr. Arthur seeks to conduct DNA tests at his own expense on various pieces of evidence for the first time, including Judy Wicker's blood-stained clothing, her rape kit, and hair samples collected from the crime scene and Judy Wicker's automobile. During her trial, Judy Wicker testified that a burglar had raped her, knocked her unconscious, and then shot Troy Wicker. Her sworn testimony was corroborated by physical injuries she had sustained from a struggle, blood-stained clothing, torn undergarment, and a rape kit that was prepared on the day of the murder.

DNA testing could demonstrate that the same person who raped Judy Wicker also physically assaulted her, that this person's blood was on her blouse, that his hair was found in the Wicker residence, that he was in Judy Wicker's 1981 Buick Riviera, and that this person was not Mr. Arthur. Such evidence could discredit entirely the only direct testimony linking Mr. Arthur to the murder, because nowhere in Judy Wicker's testimony did she allow for the possibility that two persons killed Troy Wicker.

In rejecting Mr. Arthur's discovery request, the Eleventh Circuit stated that his allegations were speculative and that "discovery cannot be ordered on the basis of pure hypothesis." (A63) Mr. Arthur's allegations are not mere speculation, however; they are consistent with Judy Wicker's previous sworn testimony that a burglar shot her husband. Moreover, in seeking discovery, "there is no requirement that [Mr. Arthur] provide evidence corroborating his allegations of what the test results will show." *Jones* v. *Wood*, 114 F.3d 1002, 1012 (9th Cir. 1997). Indeed, to establish a gateway claim of actual innocence, Mr. Arthur need not present new facts that "unquestionably establish" his innocence. *Schlup*, 513 U.S. at 317. The relevant inquiry asks whether, if the facts are fully developed, Mr. Arthur *may* be able to

demonstrate that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.

Under *Schlup*, "newly presented evidence may indeed call into question the credibility of the witnesses presented at trial." *Schlup*, 513 U.S. at 330; *see also House* v. *Bell*, 126 S. Ct. 2064, 2078 (2006). In fact, *Schlup* itself presented an issue of witness credibility: The petitioner presented affidavits to counter the testimony of two eyewitnesses who had testified at his trial. *Schlup*, 513 U.S. at 307–312. As explained above, a "petitioner's showing of innocence is not insufficient solely because the trial record contained sufficient evidence to support the jury's verdict." *Id.* at 331. Thus, by totally undermining Judy Wicker's testimony through DNA testing, Mr. Arthur could "raise[] sufficient doubt" about his guilt "to undermine confidence in the result of the trial." *Id.* at 317. Because Mr. Arthur has demonstrated "good cause," the courts below erred in denying him discovery.

II. Because Alabama Failed to Provide Mr. Arthur With Adequate Access to the Courts, Statutory Tolling Is Warranted.

As this Court has recognized, the Constitution requires states to provide inmates with meaningful access to the courts for purposes of pursuing post-conviction relief. *See Bounds* v. *Smith*, 430 U.S. 817, 828 (1977), *aff'd in part, overruled in part by Lewis* v. *Casey*, 518 U.S. 343, 350 (1996). In violation of this fundamental right, the State of Alabama failed to provide Mr. Arthur with meaningful access to adequate law library facilities at Holman Prison, or any legal assistance to prepare an initial state post-conviction petition. This failure to provide access to the courts impeded Mr. Arthur's ability to file a timely petition and thus required

the tolling of AEDPA's one-year statute of limitations until the unconstitutional impediment was removed. *See* 28 U.S.C. § 2244(d)(1)(B). Despite this, the district court determined that access to Holman Prison's law library was adequate—without permitting any discovery on this critical issue—and refused to toll the limitations period. In affirming the court below, the Eleventh Circuit ignored precedent of every other Circuit that has found similar law libraries to be constitutionally deficient.

A. The State of Alabama Failed to Provide Mr. Arthur With Meaningful Access to an Adequate Law Library.

The mere existence of a prison law library is only the beginning of the analysis; the constitutionality of a state's system depends on whether it provides inmates with "[t]he tools . . . that the inmates need in order to attack their sentences, directly or collaterally." *Lewis*, 518 U.S. at 355. As Justice Scalia explained, *Bounds* guarantees "the conferral of the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts." *Id.* at 356. And "it is that capability, rather than the capability of turning pages in a law library, that is the touchstone." *Id.* at 356–57. The Holman Prison law library facilities, however, did not provide Mr. Arthur with the "capability" to challenge his confinement through a post-conviction petition.

Around the same time that the federal and state statutes of limitations for post-conviction petitions began to run for Mr. Arthur, the State of Alabama ceased to update the death row law library at Holman Prison. As the State has conceded, this library "is not a law library that is maintained and kept current," and "is used more as a day room." (A75) The State instead has represented that death row inmates may

"request [a] book" from the general population law library, which "has been maintained current and up-to-date." *Id.* Based on this representation with respect to Holman Prison's general population library, the Eleventh Circuit affirmed the district court's finding that Mr. Arthur failed to "show that he was provided inadequate access to the prison law library." (A56)

In so affirming, however, the Eleventh Circuit disregarded the following undisputed assertions that render such access inadequate:

- Holman Prison officials did not provide inmates with prompt, adequate notice that the death row law library had been discontinued, or that the new procedures applied for obtaining books from the general population library.
- Holman Prison officials did not provide death row inmates with a list or description of books available from the general population library, even though these inmates were required to request books specifically by title or volume.
- Holman Prison officials did not provide death row inmates with any means to reference and cross-reference volumes of the United States Code and various reporters.
- Death row inmates were denied the opportunity to visit the general population library or browse through materials before requesting books.
- Holman Prison's death row law library is deficient under *Bounds*.
- The State of Alabama did not provide death row inmates with counsel or any legal assistance for

> purposes of preparing an initial state post-conviction petition.

The Eleventh Circuit's conclusion that Holman Prison's law library facilities were constitutionally adequate conflicts with decisions from other Circuits on the same issue. Specifically, other Circuits have held that prison systems that do not permit inmates physical access to law libraries but instead rely solely on "bookmobile" or "book paging" systems similar to that utilized by Holman Prison are constitutionally inadequate. *See Ansari* v. *Plummer*, No. 94-15759, 1994 WL 692925, at *1 (9th Cir. Dec. 9, 1994) (holding that a paging system requiring a prisoner to request copies of specific federal cases is unconstitutional); *Morrow* v. *Harwell*, 768 F.2d 619, 623 (5th Cir. 1985) (finding a weekly bookmobile to be inadequate access as required by *Bounds* because "[e]ven a quick research project by a trained lawyer may require reference and cross reference to numerous volumes"); *Corgain* v. *Miller*, 708 F.2d 1241, 1250 (7th Cir. 1983) (recognizing a bookmobile system as a "'Catch 22' because [an] inmate could obtain state law materials only by providing precise citations, and could obtain precise citations only if he could refer to state law materials").

This rationale for rejecting bookmobile and book paging systems is obvious:

> Simply providing a prisoner with books in his cell, if he requests them, gives the prisoner no meaningful chance to explore the legal remedies he might have. Legal research often requires browsing through various materials in search of inspiration; tentative theories may have to be abandoned in the course of research in the face of unfamiliar adverse precedent. New theories may occur as a result of a chance

> discovery of an obscure or forgotten case. Certainly a prisoner, unversed in the law and the methods of legal research, will need more time or more assistance than the trained lawyer in exploring his case. It is unrealistic to expect a prisoner to know in advance exactly what materials he needs to consult.

Williams v. *Leeke*, 584 F.2d 1336, 1339 (4th Cir. 1978). As recognized by unanimous authority of other Circuit Courts, Holman Prison's book paging system violated Mr. Arthur's constitutional right of access to the courts.

B. The State of Alabama Failed to Provide Mr. Arthur With Any Legal Assistance or Counsel to Prepare an Initial Post-Conviction Petition.

It is of no consequence that in limited circumstances Alabama courts may provide petitioners with counsel because this assistance, if it comes at all, comes too late. Unlike almost every other jurisdiction that imposes the death penalty, the State of Alabama does not automatically appoint counsel in capital post-conviction proceedings. Such appointment instead is left to the discretion of the post-conviction judge if it "appears that counsel is necessary in the opinion of the judge to assert or protect the right of the person." ALA. CODE § 15-12-23(a). An indigent inmate must first file a Rule 32 petition containing "a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds." ALA. R. CRIM. P. 32.6(b). Petitions that do not meet this stringent criterion, including those brought by an indigent inmate with no legal assistance or counsel, will be summarily dismissed. *See* ALA. R. CRIM. P. 32.7(d).

From his cell on death row in Holman Prison, Mr. Arthur could not on his own interview witnesses, investigate his claims, or fully disclose the factual bases of

his claims in order to withstand summary dismissal. Moreover, without adequate access to the law library, Mr. Arthur had no way of knowing the requirements for filing a viable Rule 32 petition. Indeed, because a death row inmate in Alabama has no post-conviction counsel until after he files his Rule 32 petition *pro se* and after that petition survives summary dismissal, access to the courts in Alabama for purposes of filing an initial Rule 32 petition can be fulfilled *only* through meaningful access to the Holman Prison law library.

As the Court noted in *Bounds*, it is "irrelevant that [a state] authorizes the expenditure of funds for appointment of counsel in some state post-conviction proceedings for prisoners whose claims survive initial review by the courts." *Bounds*, 430 U.S. at 828 n.17. The "main concern" is to "protect[] the ability of an inmate *to prepare* a petition or complaint." *Id.* (emphasis added) (internal quotation marks and citation omitted).

When Mr. Arthur was deprived of adequate access to the Holman Prison law library and legal assistance to file a post-conviction petition, he suffered actual and severe injury. Due to the State's unconstitutional conduct, Mr. Arthur was unable to prepare a petition for state post-conviction review within the deadline, was subject to less time to seek federal post-conviction review, and was prevented from filing a timely petition for federal relief. Mr. Arthur now faces execution without ever having received any collateral review of his meritorious claims. These harms fall squarely within the category of injury recognized by *Lewis*:

> When any inmate . . . shows that an actionable claim of this nature which he desired to bring has been lost or rejected, or that the presentation of such a claim is currently being prevented, because this capability of

> filing suit has not been provided, he demonstrates that the State has failed to furnish "*adequate* law libraries or *adequate* assistance from persons trained in the law."

Lewis, 518 U.S. at 356 (citation omitted).

In sum, because the State of Alabama effectively rendered Mr. Arthur incapable of challenging his conviction and sentence, Mr. Arthur was denied access to the courts. Such unconstitutional impediment warrants statutory tolling of AEDPA's limitations period.[7]

III. The Eleventh Circuit's Failure to Apply Equitable Tolling Conflicts With Other Circuits' Application of a Different Standard in Capital Cases.

The Eleventh Circuit refused to apply equitable tolling to the one-year statute of limitations governing Mr. Arthur's petition, relying in part on this Court's decision in *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418–19 (2005). In doing so, the court below applied a standard that conflicts with the standard applied by other Circuits in capital cases, and disregarded this Court's long-standing recognition that the penalty of death is qualitatively different. Under the facts of this case, equitable tolling is warranted.

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[7] At a minimum, Mr. Arthur has demonstrated good cause warranting discovery relating to the law library. He has demonstrated that he *may* be entitled to tolling if the facts relating to the general population library are fully developed. The courts below erred in denying Mr. Arthur's discovery request.

A. Because Mr. Arthur Faces Execution Without Any Collateral Review of His Claims, Less Than "Extraordinary" Circumstances Should Trigger Tolling.

In *Pace*, this Court held that a petitioner seeking equitable tolling of AEDPA's statute of limitations must establish that he has been diligent in pursuing his rights and that "some extraordinary circumstance stood in his way." *Id.* at 418. *Pace* was not a capital case, however, and did not address whether a different standard should apply to toll otherwise time-barred claims of a petitioner who could be executed without any collateral review of his claims.

In addressing this precise situation, the Third Circuit applied a less exacting standard and accepted an otherwise untimely petition of a death row inmate. The court explained:

> [I]f the limitation period is not tolled in this case, [petitioner] will be denied all federal review of his claims. Here the penalty is death, and courts must consider the ever-changing complexities of the relevant provisions [petitioner] attempted to navigate. Because the consequences are so grave and the applicable law is so confounding and unsettled, we must allow less than 'extraordinary' circumstances to trigger equitable tolling of the AEDPA's statute of limitations when a petitioner has been diligent in asserting his or her claims and rigid application of the standard would be unfair.

Fahy v. *Horn*, 240 F.3d 239, 245 (3d Cir. 2001). The Seventh Circuit has also acknowledged that an exception to the otherwise applicable standard may exist for capital cases. *See Modrowski* v. *Mote*, 322 F.3d 965, 968 (7th Cir. 2003) (attorney negligence does not rise to an extraordinary

circumstance for the purpose of equitable tolling but "[a]n exception may exist for capital cases"). *But see Johnson* v. *McBride*, 381 F.3d 587, 590–91 (7th Cir. 2004) (death is not to be considered in the equitable tolling analysis).

In contrast, the Fourth Circuit has refused to apply a different equitable tolling standard for petitioners sentenced to death. *See Rouse* v. *Lee*, 339 F.3d 238, 253–56 (4th Cir. 2003) (en banc). Likewise, the Eleventh Circuit rejected Mr. Arthur's argument that the more lenient standard adopted by the Third Circuit should apply here. (A59–61)

As a result of this split among the Circuits, the ability of death row inmates to challenge their convictions and sentences is determined in part by where their post-conviction petitions are filed. The Court should resolve this conflict by adopting the Third Circuit's approach in *Fahy*, which would best serve the interests of justice consistent with this Court's capital jurisprudence.

This Court has stressed that procedural safeguards are particularly necessary where the punishment is death.[8] Indeed, to ensure that the death penalty will be imposed reliably, collateral review of convictions and sentences is an essential part of the death penalty appellate process. *See Murray* v. *Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring in the judgment). It is only through a thorough

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[8] *See, e.g., Beck* v. *Alabama*, 447 U.S. 625, 638 (1980) ("To insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion,' we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination . . . [and] of the guilt determination."); *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976) (because the "penalty of death is qualitatively different" from even a life sentence, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case").

evaluation of collateral claims that finality in capital litigation can be justly achieved. A balance must therefore be struck between "the need for finality in death penalty cases with the requirement that a defendant have a fair examination of his claims." 135 CONG. REC. 24,693 (1989) (enacted) (statement of Sen. Thurmond upon introducing S. 1760, a precursor bill to the time limitations and tolling provisions ultimately enacted in AEDPA). Applying the *Fahy* equitable tolling standard to claims that have never been collaterally reviewed on the merits would strike the right balance, by ensuring that no one is executed without due process of law while preventing "abuse of the process." *Fahy*, 240 F.3d at 245.

Like the petitioner in *Fahy*, Mr. Arthur faces execution without any collateral review of his claims, several of which could not have been raised earlier. Mr. Arthur's trial was riddled with constitutional violations.[9] Yet his claims have never been reviewed on the merits by a state or federal post-conviction court. Moreover, Mr. Arthur has consistently maintained his innocence, which is supported in

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[9] Mr. Arthur's Petition for Writ of Habeas Corpus, which the District Court dismissed as untimely, challenged his conviction as unconstitutional on several grounds, including ineffective assistance of counsel and violations of due process, right to a fair trial and right to counsel. Prior to trial, Mr. Arthur's appointed counsel conducted virtually no independent investigation into either the underlying crime or potential mitigating evidence and were consequently wholly unprepared to defend this capital case. Furthermore, the prosecuting district attorney who represented the state at Mr. Arthur's trial previously represented the prosecution's star witness, on whose testimony Mr. Arthur's conviction was based almost exclusively, in connection with her parole proceedings. Moreover, on the first day of trial, the trial court permitted Mr. Arthur to represent himself without first conducting an inquiry into whether Mr. Arthur's waiver of his right to counsel was made knowingly and voluntarily.

part by affidavits of two alibi witnesses who have no reason to lie and who have corroborated each other's testimonies.[10] Yet Mr. Arthur's gateway claim of actual innocence has never been fully developed due to the lower courts' erroneous denial of his requests for a hearing, discovery and DNA testing. If this Court does not intervene, Mr. Arthur will be executed—for a crime he did not commit—without *any* collateral review of his trial and death sentence. Under these circumstances, AEDPA's statute of limitations should be equitably tolled.

B. Mr. Arthur Diligently Pursued His Rights.

Like the petitioner in *Fahy*, Mr. Arthur was also diligent in attempting to access both state and federal collateral proceedings. From 1998 to 2000, Mr. Arthur tried to overcome the hurdles erected by the State of Alabama, including its failure to provide adequate access to the Holman Prison law library or any legal assistance to prepare a post-conviction petition. Mr. Arthur sought post-conviction counsel and wrote countless letters to organizations, lawyers and courts seeking assistance. However, he was unable to obtain counsel or any other legal assistance before both statutes of limitations had run.

Due to the inadequate access to Holman Prison's law library, Mr. Arthur had no way of knowing that indigent death row inmates are entitled to appointed counsel in federal habeas corpus proceedings pursuant to 21 U.S.C. § 848(q)(4)(B). Though it would have been far simpler to write one letter to the district court requesting counsel,

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[10] At least one Circuit court has recognized that a claim of actual innocence may constitute extraordinary circumstances warranting equitable tolling. *See Allen* v. *Beck*, 179 F. App'x. 548, 550 (10th Cir. 2006) (unpublished).

Mr. Arthur instead engaged in a time-consuming and ultimately ineffective letter-writing campaign. No court or lawyer who responded, however, advised Mr. Arthur that he would be entitled to counsel under this provision.

Despite his diligent efforts to gain access to the courts, Mr. Arthur was not able to file a timely petition due to circumstances beyond his control. At the outset, Mr. Arthur was denied the opportunity to file a timely Rule 32 petition in the Alabama courts. He never received the certificate of judgment that triggered the limitations period, and he was not represented by counsel when that certificate was issued on April 7, 1998. By denying Mr. Arthur the opportunity to litigate his claims in state court, the State of Alabama simultaneously denied him the opportunity to toll the limitations period for filing a federal habeas petition.

Moreover, when someone did express an interest in helping Mr. Arthur, the State of Alabama intervened. An investigator offered to help Mr. Arthur in both investigating and finding counsel. But the investigator's written requests to visit Mr. Arthur were denied by Charlie Jones, then Warden of Holman Prison. (R.1-40-Ex. G) Warden Jones also denied the investigator access to Mr. Arthur even after receiving a letter from a lawyer who stated that he was considering representing Mr. Arthur and asked that the investigator be permitted to visit with Mr. Arthur. Thus, the State of Alabama thwarted Mr. Arthur's efforts to pursue his rights and put him in a "Catch-22" situation: he was unable to meet with an investigator who could help develop crucial facts without first obtaining counsel of record, but he could not obtain counsel of record without first meeting with an investigator or setting forth fully the factual bases for his Rule 32 petition.

As this Court has recognized, the equitable tolling doctrine focuses on a prisoner's diligence in "pursuing his rights." *Pace*, 544 U.S. at 418. The steps Mr. Arthur undertook to obtain post-conviction counsel constituted a reasonable exercise of diligence in pursuit of his rights. This is particularly true in light of his factually and legally complicated capital case. Indeed, the "complexity of [the Court's] jurisprudence in this area . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law." *Giarratano*, 492 U.S. at 14 (Kennedy, J., concurring in the judgment).

In light of Mr. Arthur's diligence and the circumstances warranting collateral review of his *first* habeas petition that has never been reviewed on the merits, equitable tolling should apply.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari and reverse the decision of the Court of Appeals for the Eleventh Circuit with respect to the questions presented herein.

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January 11, 2007

United States District Court
Northern District of Alabama
Southern Division

Thomas D. Arthur,	]	
Petitioner,	]	
vs.	]	
	]	
Michael Haley,	]	CV-01-N-0983-S
Commissioner,	]	
Alabama Department of	]	
Corrections,	]	
Respondent.	]	

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U.S. DISTRICT COURT
N.D. OF ALABAMA
ENTERED
DEC 04 2002

Memorandum of Opinion

This is an action for habeas corpus relief under 28 U.S.C. § 2254 by an Alabama state prisoner under a sentence of death. With the assistance of counsel, Thomas D. Arthur ("Arthur") filed his petition on April 20, 2001, challenging his December 5, 1991, state court murder conviction. The cause is presently before the court to determine if there is sufficient reason to excuse Arthur's failure to file his petition within the one-year period imposed by The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244(d)(1). The AEDPA statute of limitations was raised in the Respondent's April 23, 2001, Motion to Dismiss, and the issue has been fully briefed by the parties. For the reasons set out below, the court finds no lawful ground to excuse the untimeliness of the petition. Accordingly, the petition for the writ of habeas corpus is due to be, and will be, dismissed.

BACKGROUND

1. Arthur's first conviction and sentence of death for the murder of Troy Wicker was reversed by the Alabama Supreme Court on May 10, 1985. *Ex parte Arthur*, 472 So. 2d 665 (Ala. 1985) (details of a prior murder were improperly admitted at trial under the identity exception to general exclusionary rule).

2. Arthur was convicted and sentenced to death a second time for the Troy Wicker murder, but his second conviction and sentence were reversed by the Alabama Court of Criminal Appeals. *Arthur v. State*, 575 So. 2d 1165 (Ala. Crim. App. 1990) (trial court improperly admitted a statement made by the defendant to a police officer in the absence of counsel two weeks after he had asserted his right to remain silent), *cert. denied, Ex parte State of Alabama [Re Arthur v. State]*, 575 So. 2d 1191 (Ala. 1991).

3. Arthur was tried a third time for the murder of Troy Wicker and convicted on December 5, 1991. (CR. 11, R. 1150).[1] The trial court, following the jury's recommendation, sentenced Arthur to death on January 24, 1992. (CR. 12, 14-27; R. 1237, 1291-1300).

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[1] The record in this case consists of eleven numbered volumes comprising the proceedings at Arthur's capital murder trial, one volume comprising a supplemental record on appeal, and various loose documents memorializing the state collateral proceedings which have been attached to various pleadings filed in this court. The eleven numbered volumes include 880 numbered pages comprising the clerk's record, followed by the separately numbered transcript of the proceedings before Judge Hard. For citation purposes, the court will follow the state's example and refer to the initial 880 pages of the eleven numbered volumes as the "Clerk's Record" ("CR.") to distinguish them from the separately numbered transcript "Record" ("R."). Similarly, the initial pages in the single Supplemental Volume will be referred to as "Supplemental Clerk's Record" ("SCR.") and the following transcript pages will be referred to as the "Supplemental Record" ("SR."). Documents flied in this court will be referenced, as is this court's usual practice, by the docket number and exhibit reference, if any.

4. The Alabama Court of Criminal Appeals affirmed Arthur's conviction and death sentence on March 8, 1996. *Arthur v. State*, 711 So. 2d 1031 (Ala. Crim. App. 1996).

5. The Alabama Supreme Court affirmed the decision of the Court of Criminal Appeals on November 21, 1997. *Ex parte Arthur*, 711 So. 2d 1097 (Ala. 1997). Arthur's application for rehearing was denied on March 20, 1998. (State's Answer and Motion to Dismiss, Doc. 6, Ex. A).

6. Arthur did not petition for the writ of certiorari to the Supreme Court of the United States, nor did he seek state or federal collateral review at any time before January 25, 2001.

7. On September 15, 2000, the State filed an "Amended Motion to Set Execution Date" in the Supreme Court of Alabama. (Doc. 46, Ex. 1).

8. On January 25, 2001, Arthur, proceeding through counsel, filed his Rule 32 Petition in the Tenth Judicial Circuit Court of Jefferson County, Alabama. (Doc. 47, Ex. 1, 2). The Rule 32 Petition was dismissed as untimely on March 5, 2001. (Doc. 47, Ex. 4).

9. On March 23, 2001, the Alabama Supreme Court entered its order setting Friday, April 27, 2001, as Arthur's execution date. (Doc. 46, Ex. 3).

10. On March 28, 2001, Arthur filed a motion to reconsider the dismissal of his Rule 32 petition in the Tenth Judicial Circuit Court of Jefferson County Alabama. (Doc. 47, Ex. 5), and on April 4, 2001, Arthur filed a "Motion for Stay of Execution" in the Alabama Supreme Court. (Doc. 47, Ex. 6).

11. On April 11, 2001, the Alabama Supreme Court denied Arthur's motion to stay his execution. (Doc. 47, Ex. 8).

12. On April 20, 2001, Arthur filed his "Petition for Writ of Habeas Corpus" and his "Motion for Stay of Execution" in this court. (Doc. 1, 3). After consideration of written and oral arguments, this court entered its order granting Arthur's motion for stay on April 25, 2001. (Doc. 11). The Eleventh Circuit

Court of Appeals denied Respondent's motion to vacate or dissolve the stay on April 26, 2001. (Doc. 16).

13. Because Arthur's March 28, 2001, motion to reconsider was pending in the Tenth Judicial Circuit Court of Jefferson County Alabama, (Doc. 47, Ex. 5), this court stayed consideration of the present habeas corpus petition until the conclusion of the state court proceedings initiated by Arthur's Rule 32 petition. (Doc. 11).

14. The Alabama Court of Criminal Appeals affirmed the denial and dismissal of the state post-conviction petition on April 25, 2001. *Arthur v. State*, 820 So. 2d 886 (Ala. Crim. App. 2001). State court review of Arthur's Rule 32 petition concluded when the Alabama Supreme Court denied Arthur's petition for the writ of certiorari on November 2, 2001. (Doc. 49).

15. On May 13, 2002, the United States Supreme Court denied Arthur's petition for writ of certiorari from his state court Rule 32 proceedings. (Doc. 32).

DISCUSSION

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposes a one-year period of limitations for writs of habeas corpus. 28 U.S.C. § 2244(d)(1).[2] Unless the exceptions set out in § 2244(d)(1)(B), (C), or (D) apply, the

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[2] The one-year limitations period does not include the time during which a "properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim" is pending in the state court. 28 U.S.C. § 2244(d)(2). *Artuz v. Bennett*, 531 U.S. 4 (2000). Arthur did not seek post-conviction or collateral review in the Alabama courts prior to the expiration of the one-year AEDPA limitations period and he does not claim here that the limitations period was tolled at any time pursuant to 28 U.S.C. § 2244(d)(2). *See Webster v. Moore*, 199 F.3d 1256, 1259 (11th Cir. 2000) (state court petition filed after the expiration of the AEDPA limitations period does not toll the period because there is no period remaining to be tolled).

limitation period runs from the latest of "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). In Arthur's case, direct review concluded when the Alabama Supreme Court denied the motion for reconsideration on March 20, 1998, and, therefore, the time for seeking review in the United States Supreme Court expired on June 18, 1998. S. Ct. R. 13 (". . . a petition for writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort, . . . is timely when it is filed with the Clerk of this Court within 90 days after entry of judgment).[3] Arthur did not file his current habeas petition until April 20, 2001, approximately 21 months after AEDPA's one year limitation period expired.

Arthur claims this court should excuse his dilatory filing and reach the merits of his claim because he is actually innocent of the crime for which he was thrice convicted. Arthur further claims he is entitled to statutory or equitable tolling of the one-year limitations period. Arthur has also filed a "Motion for Leave to Conduct Discovery" (Doc. 33), seeking access to physical evidence and documents he claims are applicable to his threshold claims.

I. Discovery

Arthur seeks access to physical evidence, including Judy Wicker's clothing, a rape kit created the day of the murder, a wig and hair samples collected from Judy Wicker's car, vacuum sweepings and a hair sample from the Wicker residence, a bullet, spent cartridge casings, and a pillowcase. He also seeks documents covering the period 1998 through 2000 concerning the death row law library at Holman Prison, showing which

[3] The United States Court of Appeals has recently held that AEDPA's one year limitations period begins to run when the time for filing a petition for the writ of certiorari with the United States Supreme Court has expired. *Bond v. Moore*, 309 F.3d 770, (11th Cir. 2002) (No.00-16544, October 10, 2002).

books and materials were carried, how they were organized, the library's budget, availability of materials, other activities in the vicinity, and access to the library. Arthur claims he has shown the "good cause" required by Rule 6(a) of the Rules Governing Section 2254 Cases because the discovery requests are "directly relevant" to his claim that the AEDPA statute of limitations should not bar review of his petition.

A habeas petitioner is not entitled to discovery as a matter of course. *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). Rule 6(a) of the Rules Governing § 2254 Cases permits discovery upon a showing of good cause, which requires "specific allegations" showing reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is entitled to habeas relief. *Id.* at 908-09. "In passing AEDPA . . . Congress modified the discretion afforded to the district court and erected additional barriers limiting a habeas petitioner's right to discovery or an evidentiary hearing." *Isaacs v. Head*, 300 F.3d 1232, 1248-49 (11th Cir. 2002) (applying the diligence standard of 28 U.S.C. § 2254(e) (2) to petitioner's request for discovery and evidentiary hearing). When a habeas petitioner has failed to develop the factual basis for his claims in State court proceedings he must satisfy the stringent conditions of 28 U.S.C. § 2254(e)(2). See *Williams v. Taylor*, 529 U.S. 420 (2000).[4]

Arthur theorizes that tests of the rape kit and other evidence might place another malefactor at the scene and thereby undermine Judy Wicker's testimony that she hired Arthur to kill her husband. He points to Wicker's prior testimony that an African American man forced his way into her home, beat her, raped her, and killed her husband,[5] and he speculates that the

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[4] In his June 3, 2002, brief, petitioner argued that he need not satisfy the more stringent AEDPA standard to obtain discovery because he is not requesting an evidentiary hearing. The Eleventh Circuit's subsequent decision in *Isaacs* indicates otherwise. In any event, Arthur has failed to establish the "good cause" required for obtaining Rule 6 discovery under *Bracy*.

[5] In response to questioning at Arthur's last trial, Wicker testified that Arthur concocted the earlier story.

test results might support this alternate version of events. Arthur's conjectures fall far short of the specific allegations required by *Bracy* to establish good cause for discovery.[6] Moreover, discovery must be aimed at obtaining evidence to support a constitutional claim. *Bracy*, 520 U.S. at 905-06. At

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[6] Although Arthur generally claims that a new examination of the evidence might obtain results contrary to Wicker's version of events, his specific allegations do not support his claim. He has a notion that blood typing or DNA testing of Judy Wicker's bloody clothing might show someone else assaulted her, but there is no basis in the record for his belief that the blood on her clothing belonged to her assailant. Rather, the evidence was that Wicker was assaulted from behind, did not struggle, and was bleeding due to extensive head and face injuries. Arthur contends examination of the rape kit and vacuum sweepings could support Wicker's prior testimony about being assaulted and raped by someone else, but merely showing another person was with Judy Wicker or in her home at some unspecified time does little to support her prior testimony or further impeach her testimony about Arthur's involvement. At best, it would provide some additional inference about Judy Wicker's veracity, a subject which was amply covered during the trial. Arthur also speculates that DNA tests of the wig and hair samples from the car could show Wicker fabricated her testimony that Arthur wore a wig and dark face makeup to disguise himself as a "black man." However, expert testimony at the trial indicated the hair samples were of African American origin. Arthur provides no support for his speculation that different tests could impeach Wicker's testimony. Experts testified the cartridge casings and bullets were consistent with the type of ammunition Patricia Green obtained for Arthur on the day prior to the murder. Arthur hopes that his tests might now show an inconsistency, but does not explain the reasons for his expectation. Finally, Arthur seeks to resolve a discrepancy he perceives in the evidence. He points to expert testimony indicating gunpowder residue on the pillowcase found beneath Troy Wicker's head show the murder weapon was not discharged at close range. This, he argues, conflicts with Wicker's testimony that her husband was shot while sleeping and the autopsy report that Troy Wicker died of a gunshot wound to the right eyelid "fired at a close range." He seeks to examine the pillowcase and crime scene photographs to resolve this discrepancy. Judy Wicker did not testify about the distance between the killer and her husband so the discrepancy is not relevant to her testimony. Any discrepancy between the expert witnesses was heard and resolved by the jury and no further investigation is warranted.

best, Arthur proposes to impeach Judy Wicker's testimony, and none of his speculations, if proven, would establish he is actually innocent under either the "more likely than not" standard or the "clear and convincing" standard. *Compare Schlup v. Delo*, 513 U.S. 298 (1995) (gateway claim that petitioner is actually innocent of crime is established by evidence that petitioner is "more likely than not" innocent) and 28 U.S.C. § 2254(e)(2) (evidentiary hearing warranted if, *inter alia*, the facts underlying claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense).[7] *See Sawyer v. Whitley*, 505 U.S. 333, 349 (1992) ("... latter-day evidence brought forward to impeach a prosecution witness will seldom, if ever, make a clear and convincing showing that no reasonable juror would have believed the heart of [the witness's] account...."). Discovery is not warranted unless there is reason to believe the results would demonstrate entitlement to habeas relief. *Bracy*, 520 U.S. at 908-09.

Arthur's request for discovery regarding the death row law library is similarly deficient. The request relates solely to his tolling claims, and the results would not bear any relation to his guilt or innocence of the crime or otherwise support a constitutional claim entitling him to habeas relief. *Bracy*, 520 U.S. at 905-06 (court must identify the essential elements of constitutional claim in order to determine whether discovery would establish claim); *Harris v. Nelson*, 394 U.S. 286, 300 (1969) (court should facilitate discovery where full development of specifically alleged facts would demonstrate petitioner is confined illegally and is thus entitled to habeas relief); 28 U.S.C. § 2254(e)(2)(B) (evidentiary hearing is warranted where underlying facts could not be previously discovered through exercise of due diligence and would be

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[7] *Isaacs v. Head*, 300 F.3d 1232 (11th Cir. 2002), further indicates that Arthur's request for release of the physical evidence is due to be denied because he failed to exercise "due diligence" in pursuing the facts during the state proceedings.

sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found applicant guilty of underlying offense).

For the foregoing reasons, Arthur's request for discovery will be denied.

II. Actual Innocence

Like others before him, Arthur claims an "actual innocence" exception to the AEDPA limitation period is necessary to avoid an unconstitutional suspension of the writ. *See Wyzkowski v. Dep't of Corrections*, 226 F.3d 1213 (11th Cir. 2000). The Eleventh Circuit has yet to decide whether there is such an exception to the AEDPA limitations period, but has left the door open for consideration of the constitutional question in a case in which the petitioner is able to make a showing of actual innocence. *Wyzkowski*, 226 F.3d at *Id.* at 1217-18 (the constitutional question need not be addressed unless and until an untimely petitioner is able to make a sufficient showing of actual innocence). This court, then, has the initial task of determining if Arthur has made a showing of actual innocence sufficient to trigger the duty to evaluate the constitutional question. Upon examination of the evidence Arthur has proffered, the court is satisfied Arthur cannot meet that high standard.

Although the federal courts have long recognized that an otherwise barred petition should be reviewed to avoid a miscarriage of justice when the petitioner presents sufficient evidence of his actual innocence, different standards have been used to determine whether the petitioner has made the threshold showing sufficient to permit review. *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) ("Although demanding in all cases, the precise scope of the miscarriage of justice exception depends on the nature of the challenge brought by the habeas petitioner"). *See* 28 U.S.C. § 2244(b)(2) (except for claims based on new constitutional law made retroactive by the United States Supreme Court, consideration of any new claim in a second or successive petition is permitted when the petitioner

shows, *inter alia*, the facts underlying the claim establish his innocence by clear and convincing evidence); *Schlup v. Delo*, 513 U.S. 298, 322 (1995) (petitioner claiming actual innocence of the underlying crime must show it is "more likely than not" that no reasonable juror would have convicted him in light of new evidence); *Sawyer v. Whitley*, 505 U.S. 333 (1995) (petitioner challenging death sentence must show by clear and convincing evidence that no reasonable juror would have found him eligible for the death penalty in light of new evidence); *Herrera v. Collins*, 506 U.S. 390 (1993) (where petitioner has no claim of constitutional error at trial, he must show actual innocence of the crime by clear and convincing evidence to proceed with successive or abusive writ). This court need not linger over esoteric questions regarding the appropriate standard in this case, however, because the proffered evidence is insufficient to meet the "actual innocence" threshold even upon application of the more lenient "more likely than not" test. See *Calderon*, 523 U.S. at 558 (tension between *Sawyer* and *Schlup* standards need not detain court where claims fail under either standard).

The miscarriage of justice standard is concerned with actual as compared to legal innocence. *Sawyer*, 505 U.S. at 339. To demonstrate actual innocence the petitioner must present "new reliable evidence that was not presented at trial" and show, in light of all the evidence, "it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 299, 327-28.

The evidence at Arthur's third trial established that Troy Wicker was fatally shot on February 1, 1982, while he lay in bed at his home in Muscle Shoals, Alabama. The prosecution presented the testimony of Mary Jewel (Judy) Wicker, the wife of the victim, who testified that she had a sexual relationship with Arthur and that she paid Arthur $10,000 to murder her husband.

Talmadge Sterling, an employee of the Decatur Work Release Center at the time of the murder, testified that Arthur was an inmate of the center, but was signed out for work between 6:00 a.m. and 7:50 p.m. on the day of the murder.

Arthur was assigned to work at Reagan Mobile Homes but the operator of the business, Joel Reagan, testified he was an old acquaintance of Arthur's and, because Arthur's day to day activities at the business were not closely supervised, he did not know Arthur's whereabouts on the day of the murder. Patricia Yarborough Green testified that Arthur frequented Cher's Lounge, where she worked. He came in four to five days a week, sometimes in the company of Joel Reagan. Debra Lynn Phillips, the operator of Cher's Lounge and Arthur's paramour, also testified Arthur came to the bar four to five times per week, usually in the afternoon. Pat Halliday, a shift supervisor at Decatur Work Release Center in 1982, testified there was a discrepancy between the number of hours Arthur was away from the center and the number of hours he was actually paid for working in February and March of 1982.

Patricia Yarborough Green further testified that, on the day before the murder, she helped Arthur obtain .22 caliber mini mag long rifle bullets and that Arthur told her the bullets would be used to kill someone. Brent Wheeler, director of the Huntsville Forensic Lab in 1982, testified that the bullet removed from Troy Wicker's body was a .22 long rifle caliber consistent with a CCI brand mini mag. The four shell casings found near the body were CCI brand .22 long or long rifle casings.

In addition to the evidence tending to show Arthur had the opportunity and means to kill Troy Wicker, other evidence substantiated Judy Wicker's testimony. Joel Reagan testified he saw Judy Wicker and Arthur together at the mobile home business. Judy Wicker stated that, on the morning of the murder, she dropped her sons at school, drove back and forth on Avalon Avenue a couple of times and then picked Arthur up near the airport. This testimony was consistent with the testimony of Charles Eddie Lang, a Muscle Shoals Police officer who was serving as a school crossing guard on Avalon Avenue that morning, and observed Ms. Wicker twice pass by the crossing prior to 8:00 a.m., when he left his post. Ms. Wicker also testified that Arthur wore an "afro" wig and makeup to disguise himself as a black man, and this was

consistent with the testimony of John Kilbourne of the Alabama Department of Forensic Science at Huntsville, who stated that hair gathered by Joseph Gary Wallace from Ms. Wicker's car was negroid head hair. Wicker testified Arthur was carrying a gun and a garbage bag. Phillips testified Arthur was supposed to meet her for lunch on the day of the murder, but he was late and, instead of going to lunch, they rode to a bridge over the Tennessee River where Arthur stopped the car and threw a partially filled garbage bag wrapped in a sheet into the river.

Moreover, Arthur had a large amount of money in his possession after the murder, consistent with Wicker's testimony that she paid him for the murder out of the insurance on Troy Wicker's life. Pat Halliday testified that Arthur was transferred to the Morgan County Jail after the discovery of the discrepancy between the number of hours he was away from the center and the number of hours he was actually paid for working. Upon routine inspection of his effects prior to the transfer, twenty one hundred dollar bills were discovered in an envelope in Arthur's overcoat pocket.[8]

Arthur's claim of actual innocence rests on affidavits from Alphonso High, Ray Melson, and Billy Peebles. Doc. 36; Exhibits to Doc. 41. Mr. High attested that Arthur visited him "around 9 a.m." the morning of February 1, 1982, at his Decatur place of business, Copper Mobile Homes.[9] He stated that he believed Arthur was driving his Ford LTD and that they had a 30 minute conversation about setting up a trailer in Birmingham. Mr. High further stated that he heard about the

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[8] At trial, Arthur presented testimony from Bruce Carroll, who said he lost $6500 to Arthur in a poker game, and testimony from Gene Moon, who said that Hillard Murray gave him money to put in Arthur's coat pocket. Arthur also presented the testimony of Ronald Spears, who said Patricia Green lied in her testimony about procuring bullets for Arthur because she was threatened.

[9] Arthur submitted the affidavit of Stephen J. Gustat, a licensed private investigator from Tampa, Florida, who attested that, on Sunday, June 9, 2002, he drove the distance between the address of the Wicker home and the former location of the Copper Mobile Homes and ascertained that the drive took approximately 60 minutes.

murder of Troy Wicker on the following day and, when he heard Arthur was arrested for the murder about two months later, he recalled he had spoken with Arthur on the morning of the murder. Mr. Melson also stated he saw Arthur at Copper Mobile Homes between 8:00 a.m. and 9:00 a.m. that day.[10] Mr. Peebles stated that it was Arthur's habit to arrive at work at Reagan Mobile Homes at 7:30 a.m. and take a bubble bath until 8:00 a.m.

In response to Arthur's submission, the state procured additional statements from the affiants. Doc. 39, 53. In his second statement, Mr. High stated that he was not sure if he saw Arthur on February 1, 1982, or on another day in late January or early February of that same year. In his second statement, Mr. Peebles clarified that he could only state that Arthur's habit was to take a bubble bath between 7:30 and 8:00 a.m. but that he could not state that Arthur bathed every morning or that he was bathing on the morning of February 1, 1982. Finally, Mr. Melson stated that he signed the first affidavit while he was under the influence of strong prescription medication, and he revised his statement to say that he saw Arthur between 7:30 or 10:00 in the morning but he could not be sure that the date was February 1, 1982.[11]

In view of the witnesses' tendencies to change their statements and Arthur's long delay in presenting this evidence

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[10] Arthur submitted the Melson affidavit with his reply brief, triggering an unsolicited response from the State to which Arthur responded as discussed above. These dueling affidavits serve only to demonstrate the unreliability of the affiants. Moreover, submitting them, as he has, many years after the events in question, Arthur can hardly expect the necessary finding of due diligence that would entitle him to an evidentiary hearing to resolve discrepancies in the witnesses' stories. 28 U.S.C. § 2254(e)(2).

[11] Arthur claims, with a supporting affidavit from one of his attorneys, the State coerced the revised statements because one of the State representatives was visibly carrying a weapon. The State responded with additional evidence tending to show the statements were not coerced. This court need not resolve the issue since the change in the statements alone strengthens the conclusion that the statements are unreliable and Arthur has not shown he was diligent in pursuing this alibi evidence, so that he is not entitled to an evidentiary hearing.

the affidavits Arthur submitted are not sufficiently reliable to cast doubt on the jury's verdict. A claim of actual innocence must be supported with "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup*, 513 U.S. at 324; cf. *Herrera*, 506 U.S. at 423-24 (O'Connor, J., concurring) (observing that affidavits produced at the 11th hour with no reasonable explanation for long delay were suspect).

Furthermore, pretermitting questions of credibility, Arthur's lately acquired affidavits do not raise "sufficient doubt about [his] guilt to undermine confidence in the result of the trial . . ." *Schlup*, 513 U.S. at 317. The jury heard direct evidence of Arthur's involvement in the murder in the form of Judy Wicker's testimony. Other evidence was introduced that corroborated significant portions of Wicker's testimony. Actual innocence "does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather that no reasonable juror would have found the defendant guilty." *Schlup*, 513 U.S. at 329. In view of the significant evidence of guilt presented at Arthur's trial, this is not that "extraordinary case" in which this court could say a constitutional error "probably" resulted in the conviction of one who was actually innocent. *Id.* at 322, 327.

Finally, Arthur has requested a hearing to take testimony from High, Peebles and Melson, but has made no attempt to show he diligently pursued the factual predicate of his alibi claim in state court. 28 U.S.C. § 2254(e)(2). *Isaacs*, 300 F.3d at 1248-49. Arthur claims his attorneys failed to conduct an adequate investigation, but Arthur himself was equally responsible for making "a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court. . . ." *Williams v. Taylor*, 529 U.S. 420, 436 (2000) (interpreting 28 U.S.C. § 2254(e)(2)). His whereabouts at the time of Troy Wicker's murder was singularly within Arthur's knowledge, and yet he never made this claim or presented this evidence to *any* state court. In this circumstance, he did not act with due diligence.

III. Statutory Tolling

The AEDPA statute of limitations can be tolled until "the date on which [an] impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action." 28 U.S.C. § 2244(d)(1)(B). "[I]n the event of illegal state action preventing the petitioner from filing, the limitation period does not begin until after the state impediment is removed." *Wyzkowski*, 226 F.3d at 1216. Arthur claims the state unconstitutionally prevented him from filing his petition for collateral relief by failing to provide him with post-conviction counsel or any form of legal assistance and by failing to provide access to adequate law library facilities. He contends that Alabama is the only death penalty jurisdiction which does not provide capital prisoners with post-conviction counsel, and the failure contravenes evolving standards of decency in violation of the Eighth Amendment.

Neither the Eighth Amendment nor the due process clause requires that an indigent defendant be provided with counsel when seeking state post-conviction relief, even in a capital case. *Murray v. Giarratano*, 492 U.S. 1 (1989); *Pennsylvania v. Finley*, 481 U.S. 551 (1987). Pointing to Justice Kennedy's concurrence, Arthur argues that *Giarratano* does not apply to Alabama's capital prisoners because Virginia's death row prisoners had otherwise obtained counsel and Virginia's prison system was staffed with institutional lawyers to assist in preparing for post-conviction relief.[12] 492 U.S. at 14-15. Arthur

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[12] Arthur contends the concurring opinion operates as the holding of the Court because *Giarratano* was a plurality opinion, citing *Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . .") (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

contends that, unlike the Virginia petitioner in *Giarratano*, he suffered actual injury because he was unable to obtain counsel to represent him and he had no legal assistance. The State correctly points out that the Supreme Court has subsequently applied *Giarratano* without apparent limitation.[13] Moreover, Arthur's evidence that he failed to obtain private counsel does not satisfy his burden of showing he was actually injured by the State's procedures.

In *Bounds v. Smith*, 430 U.S. 817 (1977), the Supreme Court held that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance of counsel. *See Lewis v. Casey*, 518 U.S. 343, 346 (1996) (discussing *Bounds*). However, Bounds did not create an abstract, free standing right to a law library or legal assistance. *Casey*, 518 U.S. at 351. An inmate alleging a *Bounds* violation must show actual injury. *Id.* at 349. Alabama provides counsel for inmates pursuing state post-conviction relief whose petitions survive a summary review and Arthur has not presented any evidence that he, or any other Alabama death row prisoner who sought post-conviction counsel from the State, were denied such relief. Rule 32.7(c) of the Alabama Rules of Criminal Procedure provides:

> If the court does not summarily dismiss the petition, and if it appears that the petitioner is indigent or otherwise unable to obtain the assistance of counsel, and it further appears that counsel is necessary to assert or protect the rights of petitioner, the court shall appoint counsel.

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[13] The State cites *Smith v. Robbins*, 528 U.S. 259, 275 (2000); *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 281 (1998); and *Coleman v. Thompson*, 501 U.S. 722, 752 (1991) (disallowing claim of ineffective assistance of post-conviction counsel because there is no constitutional right to such counsel).

Id. Summary disposition is an alternative to leave to amend, and leave to amend "shall be freely granted." Rule 32.7(d). Alabama's scheme is similar to the Virginia scheme considered and approved by the Supreme Court plurality in *Giarratano*. 492 U.S. at 5-6 and n.3. Arthur did not avail himself of the Alabama procedures for obtaining post-conviction counsel and thus cannot show he would not have obtained representation if he had made a request under Rule 32.7. His failure to obtain counsel cannot be laid at the State's door in these circumstances.[14]

Arthur further contends that *Coleman v. Thompson*, 501 U.S. 722, 755-56 (1991) requires appointment of post-conviction counsel when, as in his case, the post-conviction proceedings are the first opportunity to raise claims of ineffective assistance of trial and appellate counsel. In *Hill v. Jones*, 81 F.3d 1015, 1024-26 (11th Cir. 1996), the Eleventh Circuit declined to find that such an exception to *Finley* and *Giarratano*. Arthur contends *Hill* and the other cases[15] rejecting the argument that Coleman created an exception to the *Finley* and *Giarratano* holdings are inapposite, because none involved a petitioner under sentence of death "entirely deprived" of any counsel in post conviction proceedings. However, Arthur's circumstances are similar to the capital petitioner in *Hill*, who had procedurally defaulted his ineffective assistance claims and was barred from any review of those claims. Furthermore, as stated

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[14] Moreover, nothing the State did prevented Arthur from obtaining counsel to proceed with his federal habeas petition in a timely manner under AEDPA because he could have requested counsel from the federal court. 21 U.S.C. § 848(q)(4)(B); *McFarland v. Scott*, 512 U.S. 849 (1994).

[15] Arthur concedes that a number of circuits in addition to the Eleventh Circuit have considered and rejected his argument that *Coleman* created an exception to *Giarratano* when the post-conviction proceedings are the first opportunity to raise an ineffective assistance claim. *Mackall v. Angelone*, 131 F.3d 442 (4th Cir. 1997) (en banc); *Martinez v. Johnson*, 255 F.3d 229, 240-41 (5th Cir. 2001); *Nolan v. Armontrout*, 973 F.2d 615, 617 (8th Cir. 1992); *Bonin v. Calderon*, 77 F.3d 1155 (9th Cir. 1996); *Parkhurst v. Shillinger*, 128 F.3d 1366 (10th Cir. 1997). Doc. 35, p. 19-20, n. 4.

above, Arthur has not shown that any state action "deprived" him of counsel for pursuit of post-conviction proceedings.

Arthur contends that it is of no consequence that post-conviction counsel is made available to Alabama petitioners who survive summary review because the main concern is to protect the ability of an inmate to prepare a petition or complaint. *Bounds v. Smith*, 430 U.S. 817 (1977). However, the *Giarratano* court rejected the notion that *Bounds* required appointment of post-conviction counsel before the filing of a petition. 492 U.S. at 10, n. 5. Again, there is no evidence that Arthur or any other Alabama death row inmate requested counsel from the State court and was refused or suffered a summary disposition of his claims.

Arthur further argues that the State deprived him of his constitutional right of access to the courts because the death row law library at Holman Prison is inadequate in that volumes are missing and books are scattered about the room. He claims the poor library coupled with the lack of counsel prevented him from having the tools he needed to attack his sentence. *Lewis*, 518 U.S. at 345, citing *Bounds*, 430 U.S. 817 (1977).

In a June 21, 2002, affidavit, Naomi Lyons, a correctional officer at Holman State Prison whose duties include oversight of the prison law library, stated that there is one general library in Holman Prison which contains the current United States Code. Doc. 40, Ex. G. She attested that the death row law library has not been kept current and is used primarily as a day room but death row inmates may request books from the prison law library. *Id.*[16] Arthur does not dispute Ms. Lyon's statement that he had access to the materials from the general prison library, but restricts his argument to the inadequacies of the

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[16] Arthur "reserves the right to dispute the State's factual assertions about the library system" because he was unable to interview Ms. Lyons. Doc. 41, p. 10, n. 2. He further argues that the State did not show that death row inmates were notified they no longer had a library, when and how the death row library was changed to a day room, what procedures exist for requesting a book from the general population library or how many books may be requested and how long they might be kept. As discussed above, Arthur did not disclaim access to the general population library.

death row library. See Arthur's Affidavit, attached to Doc. 36. He, therefore, has failed to allege or show any actual injury resulting from the Holman Prison library facilities. *Lewis*, 518 U.S. at 343 (to establish a *Bounds* violation, the "actual injury" that an inmate must demonstrate is that the alleged shortcomings in the prison library have hindered his efforts to pursue a nonfrivolous legal claim). Again, *Bounds* did not create an abstract, free standing right to a law library and an inmate claiming a *Bounds* violation must show actual injury. *Lewis*, 518 U.S. at 351, 355.[17]

Arthur contends that merely providing a law library, without counsel, failed to ensure that he would be able to avail himself of the state or federal court process in any meaningful way. However, the *Bounds* court specifically concluded that states must supply a law library *or* counsel. 430 U.S. 817 (1977). The *Giarratano* court specifically concluded that the *Bounds* "meaningful access" language did not abrogate the subsequent conclusion in *Finley* that states were not required to provide counsel for inmates in post conviction proceedings. *Giarratano*, 492 U.S. at 11-12.

In summary, Arthur has not established that he was actually injured by Alabama's scheme for providing inmate access to the courts. *Lewis*, 518 U.S. at 351. He did not avail himself of the procedure for obtaining an attorney under Rule 32.7 and he cannot now show that he would have been denied counsel had he pursued that avenue of relief. Furthermore, he has provided no support for any claim that the death row inmates at Holman Prison have inadequate access to library facilities. In short, the State did not place any unconstitutional impediment to Arthur's filing of his federal habeas petition sufficient to statutorily toll the AEDPA limitations period.

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[17] In *Helton v. Sec'y for the Dep't of Corrections*, the Eleventh Circuit found that equitable tolling was not warranted based on allegations that prison library facilities lacked the latest amendments to the habeas statute where the inmate made no specific allegations about his attempts to otherwise obtain the statute. *Helton*, 259 F.3d 1310 (11th Cir. 2001).

IV. Equitable Tolling

AEDPA's statute of limitations can be equitably tolled "when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000); *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999). Equitable tolling is an extraordinary remedy which is typically applied sparingly. *Steed*, 219 F.3d at 1300.

To obtain the benefit of equitable tolling, the petitioner bears the burden of showing (1) "extraordinary circumstances;" (2) which prevented him from timely filing his petition; and (3) due diligence. *Helton v. Sec'y for the Dep't of Corrections*, 259 F.3d 1310 (11th Cir. 2001).[18] The "extraordinary circumstances" standard applied by the Eleventh Circuit focuses on the circumstances surrounding the late filing, rather than the circumstances surrounding the underlying conviction. *Id.* at 1314-15. The petitioner bears the burden of proving entitlement to equitable tolling. *Jones v. United States*, 304 F.3d 1035, 1040 (11th Cir. 2002). Arthur argues that his failure to file a timely petition is due to the State's failure to provide him with notice, legal assistance, visits from investigators who wanted to help him, or adequate law library facilities.

First, Arthur argues that he did not receive the certificate of judgment triggering the limitations period and he was not represented by counsel when it was issued on April 7, 1998.[19]

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[18] Arthur contends that, because there is a particular need for collateral review of capital cases, the threshold at which a court is willing to find the "extraordinary circumstances" to warrant tolling must be lower, citing *Fahy v. Horn*, 240 F.3d 239, 245 (3d Cir. 2001). *But see Cantu-Tzin v. Johnson*, 162 F.3d 295 (5th Cir. 1998) (denying stay of execution where petitioner filed a time-barred habeas petition and no facts warranted equitable tolling). The Eleventh Circuit has not indicated that the standard for equitable tolling of the AEDPA statute of limitations should be different in capital and non-capital cases.

[19] The State presented evidence tending to show that Arthur was aware that his initial appeal through the state courts was complete and that the Alabama Supreme Court had issued a final ruling on March 20, 1998,

The Eleventh Circuit considered a similar argument in *Drew v. Dep't of Corrections*, 297 F.3d 1278, 1287 (11th Cir. 2002). Drew claimed equitable tolling applied to his delay in filing because he did not receive a court order until almost a year after it was issued. *Id.* The Eleventh Circuit rejected this argument because Drew "made virtually no effort to ascertain the status" of his claim and his lack of diligence ultimately prevented him from filing his habeas petition until long after the AEDPA limitations period had expired. *Id.* The court said,

> A lengthy delay between the issuance of a necessary order and an inmate's receipt of it might provide a basis for equitable tolling if the petitioner has diligently attempted to ascertain the status of that order and if the delay prevented the inmate from filing a timely federal habeas corpus petition.

Id. at 1288, *citing Knight v. Schofield*, 292 F.3d 709 (11th Cir. 2002). Arthur has made no attempt to show he diligently attempted to ascertain the status of his case in the state court. In view of the long period of time in which Arthur did nothing to pursue his claims, his failure to show that the lack of notice prevented him from making a timely filing, and his failure to show he attempted to ascertain the status of his case, this court will not say he acted with diligence with regard to the notice.

Second, Arthur contends the statute should be equitably tolled because he was unable to obtain legal assistance. He claims Holman Prison inmates have no access to paralegal or attorney assistance. Arthur Affidavit, Doc. 36. However, Arthur is not entitled to counsel on collateral review and his failure to procure outside counsel is not an extraordinary circumstance warranting equitable tolling. Even if his failure to obtain private counsel were extraordinary, Arthur has not shown he acted with due diligence. His extensive mail and internet campaign to

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even though no certificate of judgment was filed 18 days thereafter as required by Ala. R. App. P. 41(a).

obtain private counsel did not satisfy his obligation to pursue his habeas claims with diligence.[20]

Third, Arthur contends the State hampered his efforts to obtain outside counsel by placing restrictions on his ability to communicate with anyone who might have been able to help him. He presents evidence showing that the warden of Holman Prison refused to permit visits from investigators who were interested in his case.[21] In this regard, the court notes that the record includes copies of numerous letters Arthur sent in his attempt to find private counsel. *See, e.g.* Doc. 36, Ex. A and B. The voluminous correspondence belies his claim that he was unduly restricted in his search for private representation. Moreover, restrictions on visitors for prison inmates is not an extraordinary circumstance and Arthur's evidence that he tried to meet with private investigators does not show that he diligently pursued his claims.

Finally, Arthur contends his efforts to obtain post-conviction relief were hampered by the State's failure to provide adequate law library facilities. As discussed above, Arthur limited his contentions to the death row library and did not acknowledge the existence of the general prison library. There is no evidence the general prison library was inaccessible or otherwise inadequate. Furthermore, like the petitioner in *Helton*, Arthur makes no showing that he asked for the amendments to the habeas corpus statute or otherwise made an independent effort

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[20] Arthur's claim that he failed to file a timely petition because he lacked counsel is peculiarly lacking in force in view of the evidence that Arthur insisted on acting as his own counsel during his trial. Particularly in this case, this court is unwilling to say that a quest for counsel, without more, showed diligence in pursuing habeas claims.

[21] Arthur does not claim the warden's action was unconstitutional. The Constitution does not require that prisoners be able to conduct generalized research, but only that they be able to present their grievances to the courts. *Lewis v. Casey*, 518 U.S. at 360. As the *Lewis* court noted, even as to constitutional rights, certain restrictions are permissible if they are related to legitimate penological interests.

to determine the limitations period. 259 F.3d at 1314.[22] Again, the evidence fails to show an extraordinary circumstance beyond the petitioners control. And, like the petitioner in *Helton*, Arthur has not shown he was diligent in ascertaining the applicable limitations period.

Arthur finally argues that even if these factors did not separately amount to extraordinary circumstances, combined together they satisfy his burden. To the contrary, nothing is extraordinary about an inmate who is subject to limitations on visitors and who must follow procedures to obtain counsel and library materials. Only Arthur's failure to avail himself of those procedures is extraordinary, but that failure was not outside his control. Other circuits have concluded that a lack of legal knowledge is not an extraordinary circumstance warranting equitable tolling. *Kreutzer v. Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000); *Felder v. Johnson*, 204 F.3d 168, 171-72 (5th Cir. 2000); *and see Tower v. Phillips*, 7 F.3d 206, 211 (11th Cir. 1993) (ignorance of post-conviction remedies does not excuse a procedural default). Moreover, Arthur has not shown he exercised due diligence in pursuing his claims within the limitations period. *Sandvik*, 177 F.3d at 1271-72. "Employment of equitable tolling in [these circumstances] would cause the precise abuse that the AEDPA was enacted to prevent by creating opportunities for convicted prisoners to delay filing motions for post-conviction relief . . . ." *Jones*, F.3d at 1044.

V. Conclusion

Arthur's petition for habeas corpus relief is barred by the AEDPA limitations period. The court has examined Arthur's claims of actual innocence, statutory tolling and equitable tolling and finds them without merit. Accordingly, the petition

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[22] The District Court found *Helton* received misinformation from his counsel regarding the applicable statute of limitations, but the Eleventh Circuit concluded the attorney's miscalculation or mistake was not an extraordinary circumstance. *See Steed v. Head*, 219 F.3d 1298 (11th Cir. 2000).

will be DISMISSED with prejudice. The "Motion for Leave to Conduct Discovery," Doc. 33 will be DENIED. A separate order in conformity with this opinion will be entered.

Done, this 4th of December, 2002.

s/ Edwin Nelson

Edwin Nelson
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

THOMAS D. ARTHUR,	]	
Petitioner,	]	
vs.	]	
	]	
MICHAEL HALEY,	]	CV-01-N-0983-S
Commissioner,	]	
Alabama Department of	]	
Corrections,,	]	
Respondent.	]	
	]	

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U.S. DISTRICT COURT
N.D. OF ALABAMA
ENTERED
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Memorandum of Opinion

This is an action for habeas corpus relief under 28 U.S.C. § 2254 by an Alabama state prisoner under a sentence of death. On December 4, 2002, this court entered its opinion and order denying Arthur's petition, concluding that his failure to file his petition within the one-year period imposed by The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") could not be excused because he did not show he was actually innocent of the crime for which he was convicted[1] and he otherwise failed to establish he was entitled to statutory or equitable tolling of the one-year limitations period. This

[1] Arthur was tried, convicted and sentenced to death for the murder of Troy Wicker.

court also denied Arthur's "Motion for Leave to Conduct Discovery." (Doc. 33.) The cause is presently before the court for consideration of Arthur's "Motion to Alter or Amend Judgment," filed December 18, 2003. (Doc. 57.) Arthur claims the court erred in failing to permit discovery on the threshold questions of actual innocence and equitable and statutory tolling. The motion has been fully briefed by the parties and is ready for submission. Upon due consideration, the motion will be DENIED.

Arthur seeks discovery of certain physical evidence and an evidentiary hearing to get testimony from lately-proffered witnesses who claim knowledge of his whereabouts on the date of Troy Wicker's murder. He claims the evidence may support his gateway claim of actual innocence. This court has previously denied his requests. (Doc. 55, pp. 5-8, 15.)

A habeas petitioner is not entitled to discovery as a matter of course. *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). Rule 6(a) of the Rules Governing § 2254 Cases provides:

> A party shall be entitled to invoke processes of discovery available under Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise.

A demonstration of "good cause" requires "specific allegations" showing reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is entitled to habeas relief. *Id.* at 908-09. Furthermore, "[i]n passing AEDPA . . . Congress modified the discretion afforded to the district court and erected additional barriers limiting a habeas petitioner's right to discovery or an evidentiary hearing." *Isaacs v. Head*, 300 F.3d 1232, 1248-49 (11th Cir. 2002) (applying the diligence standard of 28 U.S.C. § 2254(e)(2) to petitioner's request for discovery and evidentiary hearing). *See Williams v. Taylor*, 529 U.S. 420 (2000). Section 2254(e)(2), which governs hearings under AEDPA, provides, in pertinent part:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that
> (A) the claim relies on–
> (i) A new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable;
> or
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2).

Section 2254(e)(2) applies only when "the applicant has failed to develop the factual basis of a claim in State court proceedings." *Id.* Thus, a prisoner can avoid application of § 2254(e)(2) by showing he was diligent in his efforts to discover the facts. *Williams*, 529 U.S. at 434-35. Arthur cannot satisfy this threshold inquiry.

The physical evidence Arthur seeks to test includes Judy Wicker's bloody clothing, a rape kit created the day of the murder, a wig and hair samples from the Wicker residence, the bullet removed from the victim's body, spent cartridge casings found at the murder scene, and a pillowcase found beneath the victim's head. None of this evidence is new or was unknown to Arthur during the state court proceedings. Arthur belatedly claims he diligently sought to test this evidence during the state court proceedings, and points to a motion made by counsel at his third trial, seeking "[a]ll clothing taken as evidence from . . . any person," and "[a]ll other physical evidence taken by the state from the scene of the alleged crime or from any victim as part of its investigation in this case, including but not limited to,

seminal fluid, spent bullets, bullet casings, and so forth."[2] However, he has not shown that he pursued this request any further.[3] A similar one-time request was found to be insufficient evidence of diligence in *Williams v. Taylor*, 529 U.S. at 439-40.

Arthur has not pointed to any record of an attempt in state court to show that Alphonso High, Ray Melson, or Billy Peebles had information about his whereabouts on the morning of Troy Wicker's murder.[4] He does not contend that he was previously unaware that these men might have knowledge of his whereabouts on the day of the murder, and to do so would be incredible since the testimony now proffered would be that he was in their company on that day. Again, this claim was known to Arthur, but not diligently pursued in state court.[5]

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[2] "Motion to Inspect, Examine, and Test Physical Evidence," dated July 5, 1991, cited at n.1, "Thomas D. Arthur's Motion to Alter or Amend Judgment," Doc. 57.

[3] Testimony about the bullet, casings, wig and hair samples was received at Arthur's third trial. *See Memo. Opinion*, Doc. 55, pp. 10-12. There is no indication that the defense pursued any claim regarding testing of the [sic] these or other materials during the subsequent state court proceedings. *Arthur v. State*, 711 So. 2d 1031, 1047, 1065, 1068-69 (Ala. Cr. App. 1996). DNA testing was available in Alabama before Arthur's third trial in 1991. *See, e.g., Dubose v. State*, 662 So. 2d 1156 (Ala. Cr. App. 1993).

[4] The court notes that, in conjunction with a request for continuance, Arthur made a non-specific claim that other witnesses needed to be examined. He did not specifically name any witness. *Arthur*, 711 So. 2d at 1068-69. Arthur has not pointed to any place in the state court record that would evidence a previous attempt to obtain testimony from these affiants.

[5] The court has considered Arthur's renewed arguments that the affidavits are sufficient to support his gateway claim of actual innocence, and finds no reason to change its initial conclusion that the affidavits were not the "new, reliable evidence" required by *Schlup v. Delo*, 513 U.S. 298 (1995). Arthur offers no explanation for his long delay in submitting this evidence. Although he claims his counsel was constitutionally deficient, he has not pointed to any single instance in any of his three trials or in any of his appeals in which he informed a state court of the existence of these witnesses. Specifically, the court notes that Arthur substantially participated in the presentation of his defense at the third trial and he had

When a habeas petitioner fails to "make a reasonable attempt, in light of information available at the time, to investigate and pursue claims in state court," he may not obtain discovery or an evidentiary hearing unless he satisfies the requirements in the balance of § 2254(e)(2). *Williams*, 529 U.S. at 440. Arthur has not attempted to show that he can satisfy the requirements of Subparagraph (A), and there is no evidence that the discovery he is seeking relates to a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable or a factual predicate that could not have been previously discovered through the exercise of due diligence." Neither has he met the additional requirements of Subparagraph (B), showing that "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."[6]

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many exchanges with the trial court, but he did not tell the court that he knew of relevant alibi witnesses his attorneys failed to investigate.

[6] Relying on *O'Neal v. Lampert*, 199 F. Supp. 2d 1064 (D. Oregon 2002), Arthur argues that the *Schlup v. Delo* "more likely than not" standard should apply to his discovery requests because he is seeking discovery to establish his "gateway" claim of actual innocence. Although the *O'Neal* court made a distinction, for discovery purposes, between claims on the merits and claims brought to toll the statute of limitations, it did not offer any explanation for doing so. The Eleventh Circuit has recognized that discovery in habeas cases, previously pursued under *Bracy* and Rule 6(a) of the Rules Governing § 2254 Cases, was further limited by AEDPA. *Isaacs v. Head*, 300 F.3d 1232, 1248-49 (11th Cir. 2002) (discussing *Bracy* and Rule 6(a) and adding, "[i]n passing AEDPA, however, Congress modified the discretion afforded to the district court and erected additional barriers limiting a habeas petitioner's right to discovery or an evidentiary hearing.") *See also Crawford v. Head*, 311 F.3d 1288 (11th Cir. 2002) (same). Nothing in § 2254(e)(2), *Isaacs*, or *Crawford* supports Arthur's claim that § 2254(e)(2) does not apply to his discovery for "gateway" claims. Indeed, such an interpretation would appear to be contrary to the purposes of AEDPA. Moreover, this court is satisfied that the proposed discovery would not yield evidence showing Arthur's factual innocence even under the more lenient "more likely than not"

Furthermore, if Rule 6(a) applies rather than Section 2254(e)(2), Arthur's conjectures about the relevance of the evidence to his claim of actual innocence fall far short of "specific allegations showing reason to believe" that the fully developed facts might entitle him to relief. *Bracy*, 520 U.S. at 908-09. Arthur seeks DNA testing of the blood on Judy Wicker's clothing, stating that he wants to show her assailant was someone other than him, but he offers no "reason to believe" that the blood on Judy Wicker's clothing came from anyone other than Judy Wicker. Arthur seeks to examine the "afro" wig and Negroid hair samples taken from Judy Wicker's car, contending testimony that the hair was forcibly removed and the inside of the wig was free of hair was inconsistent with Wicker's testimony that Arthur wore a black wig to disguise himself. While there has been no explanation for the hair found in the car and the lack of hair in the wig, the findings are not inconsistent with Wicker's testimony. Further, Arthur offers no "reason to believe" his examination would reveal anything other than what is already established, and therefore, there is no "reason to believe" his examination could show he is "more than likely" innocent.

Arthur seeks access to the bullet recovered from Troy Wicker's body and four spent cartridge casings found at the scene, claiming Patricia Green's testimony that she sent a third party to purchase .22 mini magnum long rifle bullets for Arthur on the day before the murder was insufficiently corroborated by the ballistic expert's testimony that the recovered bullet was a .22 long rifle caliber consistent with a CCI brand mini mag and the four shell casings were CCI brand .22 long or long rifle casings. But, Green's testimony was consistent with the testimony of the ballistic expert and does not require corroboration. Moreover, Arthur does not offer "reason to believe" that his examination of the bullet and casings will reveal any different information from that already discovered by the experts.

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standard. Accordingly, this court concludes *O'Neal v. Lampert* is not persuasive.

Arthur seeks access to a gunpowder-tainted pillowcase and crime scene photographs arguing he must resolve an inconsistency between the ballistic expert's testimony and the autopsy report regarding the "critical issue" of whether the gun was fired at close or far range. However, he offers no explanation for his conclusory claim that this discrepancy is "critical" to his claim of actual innocence. He implies that he might be able to impeach Judy Wicker's testimony that her husband was sleeping when he was shot, but Wicker did not testify about the distance from which Troy Wicker was shot.

Arthur seeks to test Judy Wicker's rape kit. He alleged in his initial motion and in his present motion that Judy Wicker previously testified a "black man" forced his way into her home, beat her, raped her, and killed her husband, but he did not point to any evidence of record that supports his assertion. (Doc. 33, 57.) This court's review of the published opinions and the transcript of Arthur's last trial did not uncover any testimony that Judy Wicker was raped or that she had sexual intercourse on the morning of her husband's murder. Arthur has not offered any reason to believe that testing the rape kit would help show he was "more likely than not" actually innocent of Troy Wicker's murder. Similarly, Arthur has not explained how examination of vacuum sweepings of the Wicker home could show he is "more likely than not" actually innocent.

Finally, none of the physical evidence can help Arthur establish his gateway claim of actual innocence because such a claim must rest on "new reliable evidence" which was "not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). Although Arthur claims some of the items were not tested, he does not claim or show that the items or proposed tests were unavailable at the time of his trial. Many of the items were admitted at trial. Thus, this evidence is not "new" as required by *Schlup*.

Arthur also seeks discovery of material regarding the availability of law library facilities at Holman Prison, contending that the AEDPA statute of limitations should be equitably tolled because the death row law library did not have a copy of the new statute. The AEDPA statute of limitations can

be tolled until "the date on which [an] impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action." 28 U.S.C. § 2244(d)(1)(B). As discussed in the initial opinion, Arthur did not show he suffered any "actual injury" resulting from the Holman Prison library facilities.[7] (Doc. 55, pp. 19-20.) *Lewis v. Casey*, 518 U.S. 343, 351, 355 (1996) (inmate does not have abstract, free-standing right to a law library and must show "actual injury" in that the alleged shortcomings hindered his efforts to pursue a nonfrivolous legal claim). Like the petitioner in *Helton v. Secretary for the Department of Corrections*, 259 F.3d 1310 (11th Cir. 2001), Arthur claims only that the Holman death row library is deficient and makes no specific allegations about his attempts to otherwise ascertain the applicable statute of limitations. (Arthur Affidavit, Doc. 36.) The discovery he seeks[8] may or may not reveal shortcomings in the Holman

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[7] The State provided evidence that the "death row" library no longer existed and that death row inmates had access to a general population library containing a current United States Code. The court previously noted that Arthur did not dispute this evidence but limited his argument to a claim that the death row library was inadequate. Arthur now contends that he failed to rebut the evidence because his affidavit was submitted before the State's submission of evidence. (Doc. 57, p. 8.) However, Arthur had an opportunity to reply to the State's submission and this court accepted other evidence Arthur offered in connection with his reply. He offers no explanation for his failure to submit a responsive affidavit or to otherwise dispute the State's evidence about the library at Holman Prison. Arthur has never stated that he was unaware of the availability of the general library.

[8] Arthur seeks to discover "documents covering the period from 1988 through 2000 and concerning (1) books and other written materials carried by the (death row) library, including their titles, volumes, versions, copyright dates, and number of copies; (2) the organization and categorization of books and written materials carried by the library; (3) federal habeas corpus statutes carried by the library, including amendments, volumes, titles, and sections; (4) the budget of the death row library, including itemizations of funds earmarked for books, staffing, repairs to the premises, and other expenses; (5) the number of

library system, but it will not lead to information about the efforts Arthur made to ascertain his rights, which is an essential element lacking in his constitutional claim. There is no "good cause" for discovery when the proposed discovery is not aimed at obtaining evidence to support a constitutional claim. *Bracy v. Gramley*, 520 U.S. 898, 905-06 (1997).

Upon reconsideration, the court finds no reason to alter its previous decision in this matter. Accordingly, Arthur's "Motion to Alter or Amend Judgment," filed December 18, 2003, will be denied by separate order.

Done, this 4th of June, 2003.

s/ L. SCOTT COOGLER
L. SCOTT COOGLER
UNITED STATES DISTRICT JUDGE

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typewriters, photocopying machines, stamps, paper and pens available to death row inmates, including their costs and complaints about malfunctions, and the schedule of mail pickup and delivery; (6) any activities or services located in or available at the death row library not directly related to reading, writing, and research; (7) the schedule and hours during which the library can be accessed, and the number of death row inmates who have accessed the library, including any unsuccessful attempts; and (8) document retention or destruction policies of Holman in effect from January 1, 1998 to the present." Doc. 33, attached memo., pp. 12-13.

Thomas D. ARTHUR, Petitioner–Appellant,

v.

Richard F. ALLEN, Respondent–Appellee.

No. 03-14304.

United States Court of Appeals, Eleventh Circuit.
June 21, 2006.

Suhana S. Han, Sullivan & Cromwell, LLP, Theresa Marie Trzaskoma, Brune & Richard, LLP, New York City, for Arthur.

J. Clayton Crenshaw, Montgomery, AL, for Allen.

Appeal from the United States District Court for the Northern District of Alabama.

Before BIRCH, BLACK and BARKETT, Circuit Judges.

BIRCH, Circuit Judge:

An Alabama jury found petitioner Thomas D. Arthur ("Arthur") guilty of capital murder and recommended that he be sentenced to death. After exhausting his state court remedies, Arthur filed a federal habeas corpus petition pursuant to 28 U.S.C. § 2254. The district court denied Arthur's habeas petition, but granted a certificate of appealability ("COA") on four issues. After a thorough review of the record, and having the benefit of oral argument and the parties' briefs, we AFFIRM the district court's judgment denying Arthur habeas relief.

I. BACKGROUND

A. *Facts*[1]

[1] Except as otherwise cited, the facts are taken from opinions of the Alabama Court of Criminal Appeals. *See Arthur v. State*, 711 So.2d

On 1 February 1982, at 9:12 A.M., police officers were called to the residence of Mary Jewel "Judy" Wicker ("Wicker") and Troy Wicker ("Troy") in Muscle Shoals, Alabama. The officers found Troy murdered in his bed; his wife, Wicker, lying on the floor with traces of blood on her face; and her sister, Teresa Rowland ("Rowland"), kneeling beside her. R1–22, Exh. Vol. 6 at 315–16. The investigators found four .22 caliber expended cartridge cases on the bed. An autopsy revealed that Troy's death was caused by a close range wound through his right eye from a .22 caliber long rifle bullet which severed his brain stem.

Wicker told the investigators that, after she had dropped her children off at school, she had returned to find an African American man in her home. She said that the man raped her, knocked her unconscious, and shot Troy. Wicker was subsequently charged and convicted of murdering Troy to collect insurance proceeds, and was sentenced to life imprisonment. *See Wicker v. State*, 433 So.2d 1190 (Ala.Crim.App.1983). Some time after Wicker's conviction, the prosecuting district attorney appeared before the parole board to inquire about the possibility of an early release in exchange for Wicker's testimony against Arthur. Wicker's daughter, Tina Jenkins, retained attorney Gary Alverson to appear at this meeting on her behalf. Alverson was later hired as a state prosecutor.

In 1991, during Arthur's trial for Troy's murder, Alverson represented the state and Wicker testified as the prosecution's main witness. She explained that she had known Arthur since they were both young and worked at Tidwell Homes. She revealed that she, Rowland, and Rowland's boyfriend, Theron McKinney ("McKinney") had discussed killing Troy beginning in early 1981. R1–22, Exh. Vol. 9 at 747–48. Wicker

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1031, 1043 n.1 (Ala.Crim.App.1996) ("*Arthur VI*") (referencing the "earlier rendition of the facts found at *Arthur v. State*, 575 So.2d 1165, 1167–70 (Ala.Crim.App.1990)('*Arthur IV*') for an overall picture of the evolution of this case").

explained that Troy was physically violent with her, and that Rowland and Troy often argued when Troy threatened to turn Rowland in to the police for the arson on her home which he had committed for her. Wicker recalled that she received a telephone call from Arthur in November 1981 in which he told her that he had been "hired to do the job . . . [to] kill [her] husband." *Id.* at 748–51. She saw him the next week and began a sexual relationship with him. At that time, Arthur was residing at the Decatur Work Release Center and was assigned to work at Reagin Mobile Homes.

Wicker testified that she knew that the murder was to take place on 1 February 1982, and that she had agreed to tell the police that her home was burglarized and that her husband was murdered by an African American man. She explained that, on the day of the murder, she met Rowland and Arthur at the airport. She stated that Arthur, who had been drinking and was carrying a gun and a garbage bag, had painted his face black and put on an Afro wig and black gloves. She testified that Arthur got into her car and, while driving him to her house, she urged him not to kill Troy. She stated that, after they arrived at her house, she heard a shot and that Arthur then struck her, knocked out several of her teeth, and lacerated her lip. Wicker admitted that, after she collected $90,000 in insurance proceeds from Troy's death, she paid Arthur $10,000, paid Rowland $6,000, and gave McKinney jewelry and a car for their assistance in the murder. She also admitted that she continued her relationship with Arthur after the murder.

Wicker's testimony was corroborated by other witnesses and evidence. Muscle Shoals Police Sergeant Eddie Lang testified that, while he was working at a school crossing about 7:40 A.M. on 1 February, he observed Wicker driving east toward the airport and, about 10 minutes later, returning toward her house. He did not see anyone in the car with her during either trip. The work release facility's records for the day of the murder showed that Arthur had signed out of work release at 6:00 A.M. and had not returned until 7:50 P.M. Joel Reagin, the owner of Reagin Mobile Homes, was unable to say whether Arthur was at work on the day of the murder. He remembered, however, having

seen Wicker and *Arthur together at Reagin* Mobile Homes while Arthur was working there.

Patricia Yarborough Green, a waitress at Cher's Lounge, testified that, on 31 January 1981, the day before the murder, Arthur asked her to send a friend to purchase .22 caliber Mini-Mag long rifle bullets for him and gave her $ 10 for the purchase. She said that, while they were waiting for the friend to return with the bullets, Arthur told her that they would be used to kill someone. She gave the bullets to Arthur when she received them. Debra Lynn Phillips Tynes, the manager of Cher's, went to lunch with Arthur on the day of the murder. While they were out, Arthur drove to a bridge over the Tennessee River, stopped the car, and dropped a black garbage bag into the river. She said that he explained to her that he wanted to get rid of some old memories. On the day of the murder, Wicker's automobile was found in the parking lot at Northwest Junior College in Tuscumbia, Alabama. Inside the car, officers found Wicker's purse and an Afro wig; the inside of the wig contained no human hairs.

In March 1982, officials at the work release center discovered a discrepancy between the amount of time that Arthur had logged as being at work and the amount of money that he had been paid for that work, and transferred him to the county jail pending investigation. After he left the work release center, his personal belongings at the work release center were inventoried and a Reagin Mobile Homes envelope containing $2000 was discovered.

In April 1982, Arthur was interviewed by a Muscle Shoals Police Department detective and denied knowing anything about Troy's homicide or knowing Wicker or Rowland. When the officer confronted Arthur with contrary information, Arthur asked to see an attorney and refused to make any further comments.

B. *Procedural History*

Arthur was indicted and charged with intentionally murdering Troy by shooting him with a pistol after having been

convicted of second degree murder in violation of Ala.Code § 13A–5–40(a)(13) (1975). He was convicted and sentenced to death in 1982. *Arthur v. State*, 472 So.2d 650, 654 (Ala.Crim.App.1984) ("*Arthur I*"). The Alabama Supreme Court reversed this conviction, holding that the details of Arthur's prior second-degree murder conviction were improperly admitted at trial under the identity exception to the general exclusionary rule, *In re Arthur*, 472 So.2d 665, 668-70 (Ala.1985) ("*Arthur II*"), and the Alabama Court of Criminal Appeals remanded the case for a new trial, *Arthur v. State*, 472 So.2d 670 (Ala.Crim.App.1985) ("*Arthur III*").

Arthur's second trial occurred in 1987. He was again convicted, and sentenced to death. On appeal, the Alabama Court of Criminal Appeals reversed this conviction, holding that the admission of Arthur's statement to a police officer roughly two weeks after he had asserted his right to remain silent constituted plain error because Arthur did not initiate the conversation and there was no evidence that he had been given access to an attorney following his assertion of his right to remain silent. *Arthur v. State*, 575 So.2d 1165, 1171–75 (Ala.Crim.App.1990) ("*Arthur IV*"). The State of Alabama's petition for writ of certiorari was denied. *In re Arthur v. State*, 575 So.2d 1191 (Ala.1991) (per curiam) ("*Arthur V*").

In December 1991, Arthur was tried again. Before the trial began, Arthur advised the court that he was concerned about the attorneys who had been appointed to represent him. R1–22, Exh. Vol. 5 at Trial Transcript 15–24. He explained that, after the reversal of his second trial in 1990, he did not hear from his appointed counsel, William Del Grosso ("Del Grosso") or any other attorney until July 1991. In July 1991, he received visits at the prison from both attorney Harold Walden and from Del Grosso. Walden indicated that Del Grosso would be serving as lead counsel. During his meetings with Walden and Del Grosso, Arthur requested that they move for the appointment of an investigator because there were "many aspects of this case" that had never been investigated. *Id.* at 16–18. Arthur explained that he attempted to communicate with Del Grosso through at least thirteen letters and at least forty telephone calls,

but did not receive a response. Finally, in November 1991, less than one month before the trial was to begin, Arthur was contacted by an investigator. The investigator told Arthur that it was physically impossible to conduct the investigation that he had requested before the trial was scheduled to begin.

Because of his concerns about Del Grosso's representation of him, Arthur requested leave to participate as counsel during the trial. The trial court permitted Arthur to act as "co-counsel" with his appointed attorneys, Harold Walden and his son, Joseph Walden, and Del Grosso as "stand-by counsel." R1–22, Exh. Vol. 1 at 5, 66; *id.*, Exh. Vol. 5 at Trial Transcript 24–27. Arthur actively conducted much of the voir dire, examinations, and arguments. He cross-examined all of the prosecution witnesses and presented four defense witnesses; he did not testify on his own behalf. The defense witnesses testified about the crime scene, the source of the money in Arthur's possession, and the pressure that Green had received from the police for testimony about the bullets. In an attempt to provide an alibi defense, Arthur asked Reagin whether he remembered one of his employees, Larry Whitman, saying that he had seen Arthur on the morning of the murder. Arthur did not, however, either reference or call potential alibi witnesses Alphonso High or Ray Melson. The jury returned a verdict of guilty as charged at 5:05 P.M. on 5 December 1991. *Id.* at Exh. Vol. 11 at 1149–50.

At 5:33 P.M. on 5 December, the sentencing phase began. *Id.* at 1165. Walden argued for mitigation based on (1) Arthur's good conduct while in prison and his participation in a program to deter crimes as a speaker in high schools; and (2) the disproportionate punishment Arthur was facing as compared to the other persons involved in the crime. Arthur followed Walden and argued that he should be sentenced to death. He explained that he did not have a death wish and did not believe that he would be executed. He elaborated that he had previously been convicted and sentenced to death twice for Troy's murder and both of those convictions had been reversed on appeal. He claimed that a death sentence would allow him to spend more time with his children during their visits while he

was in prison, provide him with a more private cell, and give him more control over his appeal.

The jury began deliberations at 6:28 P.M. and returned an advisory verdict of death at 7:25 P.M. *Id.* at 1233, 1236–37. The trial court found that the aggravating factor, Arthur's conviction for second-degree murder, outweighed the mitigating factor, the culpability of the un-prosecuted accomplices, Rowland and McKinney, and sentenced Arthur to death.

Following this trial, court-appointed counsel Harold Walden and Joseph Walden were permitted to withdraw, and attorney Michael Sanderson was appointed to represent Arthur on appeal. Kevin M. Doyle and Barry J. Fisher were later substituted in Sanderson's place as Arthur's counsel for his appeals and petitions for postconviction relief. Arthur's third conviction was affirmed. *Arthur v. State*, 711 So.2d 1031 (Ala.Crim.App.1996) ("*Arthur VI*"). While his case was on appeal, attorney Fisher was permitted to withdraw as counsel. Arthur appealed to the Supreme Court of Alabama. *In re Arthur*, 711 So.2d 1097 (Ala.1997) ("*Arthur VII*"). He was initially represented by attorney John P. Rall and, upon his withdrawal, by attorney Lajuana Davis. *Id.* at 1098. The judgment of the Alabama Court of Criminal Appeals was affirmed and the certificate of judgment issued on 7 April 1998. *Id.* at 1098, 1101. Arthur did not file a petition for writ of certiorari to the United States Supreme Court.

In "mid to late October 2000," attorney Arnold J. Levine agreed to represent Arthur in his state and federal postconviction relief proceedings. R1–1 at 149. In January 2001, Arthur's state petition for postconviction relief pursuant to Alabama Rule of Criminal Procedure 32 was filed challenging his 1996 conviction and sentence, and he moved for leave to file the postconviction petition out of time.[2] On 14 March 2001, the trial court's dismissal of the postconviction petition as untimely was affirmed on appeal because of the "mandatory and jurisdictional" two-year limitations period

[2] Attorney Levine represented Arthur in these filings.

required by Alabama Rule of Criminal Procedure 32.2(c). *Arthur v. State*, 820 So.2d 886, 888–90 (Ala.Crim.App.2001) (per curiam) ("*Arthur VIII*").[3] On 23 March 2001, the Supreme Court of Alabama set Arthur's execution date for 27 April 2001. *In re Arthur*, 821 So.2d 251 (Ala.2001) ("*Arthur IX*"); R1–11 at 1. His motion for rehearing of the Alabama Court of Appeals' affirmance of the trial court's dismissal of his petition was denied. *Arthur VIII* at 886. His petition for writ of certiorari was also denied. *Arthur v. Alabama*, 535 U.S. 1053, 122 S.Ct. 1909, 152 L.Ed.2d 819 (2002) ("*Arthur X*").[4]

On 20 April 2001, Arthur, represented by attorneys Levine and E. Niki Warin, filed a federal petition for writ of habeas corpus.[5] The district court stayed the federal petition for writ of

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[3] Levine again represented Arthur in this proceeding.

[4] Levine represented Arthur in these filings.

[5] In his federal habeas petition, Arthur alleged numerous claims of ineffective assistance of trial and appellate counsel. He also maintained that the trial court erred by allowing him to act as his own "co-counsel;" failing to determine Arthur's competence to stand trial; failing to grant Arthur a continuance for investigation and for his attorney to prepare an adequate defense; admitting inadmissable evidence, hearsay, and the testimony of a perjured witness during the guilt-phase; removing several prospective jurors who did not indicate their views on capital punishment; impermissibly failing to sequester the selected jurors; permitting the jury to engage in impermissible conduct; failing to require the state to comply with *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); and failing to provide him with the basic tools to present a defense.

Arthur also raised other issues, arguing that the trial court erred by questioning the jurors about their views on the death penalty but not on their views regarding a life sentence; that he was impermissibly transferred to a county outside the county where the murder occurred; that he was unconstitutionally indicted because he was charged twice, within the same indictment, for the same offense and because his 1977 offense was used as an element of the offense; that he was denied discovery and the ability to present crucial evidence; that the prosecutor improperly extracted promises from the jurors to rely on certain evidence; that the trial court's guilt-phase instructions were fundamentally flawed; and that his third retrial constituted double jeopardy. He also argued that his right to a reliable sentencing was violated when: the verdict form

habeas corpus pending the Alabama courts' disposition of his state petition for postconviction relief and granted a stay of execution. On appeal, we denied the motion to vacate the stay.[6] *Arthur v. Haley*, 248 F.3d 1302, 1303 (11th Cir.2001) (per curiam) ("*Arthur XI*").

Following the dismissal of Arthur's state postconviction petition, Arthur filed a memorandum in support of his federal habeas petition.[7] In the memorandum, Arthur argued that his untimely claims should be considered because he was actually innocent and because Alabama created an unconstitutional impediment to his timely filing and extraordinary circumstances. He also argued that his trial and sentencing were constitutionally defective because the prosecutor had an irreconcilable conflict of interest, his trial and appellate counsel were ineffective, and the trial court failed to ensure that Arthur's decisions to represent himself and to request the death penalty were knowing and voluntary.

The district court dismissed Arthur's habeas petition finding "no lawful ground to excuse the untimeliness of the petition," R3–55 at 1, and denied Arthur's motion to alter or amend judgment. The district court granted a certificate of appealability on the claims requested by Arthur and deemed Arthur's motion for a certificate of appealability as his notice of appeal.

II. ISSUES

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given to the jury only recommended death; he was permitted to argue for death; there was no consideration of non-statutory mitigating evidence; and the prosecutor made improper, highly prejudicial comments during closing arguments. He also contended that the death penalty, as applied in Alabama, constituted cruel and unusual punishment. R1–1.

[6] In the appeal from the order granting a stay of execution, Arthur was represented by attorneys Levine and Bryan A. Stevenson. *Arthur XI*, 248 F.3d at 1302.

[7] The district court granted attorneys Suhana S. Han and Theresa Marie Trzaskoma admission *pro hac vice*, and they joined Levine in the representation of Arthur. Han, Levine, and Trzaskoma continue to represent Arthur on appeal.

1. Whether Arthur was entitled to consideration of the merits of his habeas petition claiming actual innocence.

2. Whether Arthur was entitled to discovery and a hearing to further develop his actual innocence claim.

3. Whether statutory tolling should be applied to the statute of limitations governing Arthur's claims and whether he is entitled to discovery on this issue.

4. Whether equitable tolling should be applied to the statute of limitations governing Arthur's claims and whether he is entitled to discovery on this issue.

III. STANDARD OF REVIEW

We review *de novo* the district court's dismissal of a state prisoner's petition for writ of habeas corpus. *See Drew v. Department of Corr.*, 297 F.3d 1278, 1283 (11th Cir.2002). This review includes the determination that the petition was time-barred under the Antiterrorism and Effective Death Penalty Act's ("AEDPA") limitation period. *Moore v. Crosby*, 321 F.3d 1377, 1379 (11th Cir.2003). We also review *de novo* the district court's resolutions of legal questions and mixed questions of law and fact. *Mincey v. Head*, 206 F.3d 1106, 1131 (11th Cir.2000). Because the question of a party's diligence is a question of fact, we review it, and other factual findings, for clear error, and will affirm "unless the record lacks substantial evidence to support that determination." *Drew*, 297 F.3d at 1283 (internal quotations and citation omitted). We review for abuse of discretion the district court's denial of discovery, *Bracy v. Gramley*, 520 U.S. 899, 909, 117 S.Ct. 1793, 1799, 138 L.Ed.2d 97 (1997), and of an evidentiary hearing regarding equitable tolling. *Drew*, 297 F.3d at 1283. Under the abuse of discretion standard, we consider whether the district court's decision was based on an erroneous legal conclusion because "[a] district court by definition abuses its discretion when it makes an error of law." *Koon v. United*

States, 518 U.S. 81, 100, 116 S.Ct. 2035, 2047–48, 135 L.Ed.2d 392 (1996). Finally, our review in a case that challenges a state conviction under 28 U.S.C. § 2254, as amended by the AEDPA, "is greatly circumscribed and is highly deferential to the state courts." *Crawford v. Head*, 311 F.3d 1288, 1295 (11th Cir.2002).

IV. DISCUSSION

We begin our treatment of Arthur's claims by reviewing the statute under which his application was held to be time-barred, and then consider whether his claims are appropriate for any of the exceptions to that bar.

A. *The Statute of Limitations*

An application for writ of habeas corpus, filed by a person in custody subject to a state court judgment, is due to be filed within one year, in relevant part,

> from the latest of—
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
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> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
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> . . . .

28 U.S.C. § 2244(d)(1). We have held that, in a situation as that presented here, where the § 2244(d)(1) limitation period has expired and the petitioner is claiming actual innocence, we must first consider whether the petitioner can show actual innocence before we address whether an exception to the limitation period is required by the Suspension Clause of the United States Constitution, U.S. Const. art. I, § 9, cl. 2. *Wyzykowski v. Department of Corr.*, 226 F.3d 1213, 1218 (11th Cir.2000). In

Wyzykowski, we left open the question of whether the § 2244 limitation period to the filing of a first federal habeas petition constituted an unconstitutional suspension of the writ because we found the record inadequate for our review of the actual innocence claim. *Id.* at 1218–19; *see also Sibley v. Culliver*, 377 F.3d 1196, 1205 (11th Cir.2004) ("Following *Wyzykowski*," we declined to reach the merits of whether the Suspension Clause requires an exception to the § 2244 limitations period because the petitioner failed to make a sufficient showing of actual innocence).

B. *Arthur's Claims of Exception to the Statute of Limitations*

1. *Actual innocence*

In 2002, Arthur submitted affidavits in support of his claim of actual innocence.[8] He maintained that these witnesses could corroborate that he was not at the Wicker residence on the morning of the murder.

Alphonso High, the owner of Copper Mobile Homes in 1982, said that, "[o]n the morning February 1, 1982 around 9 a.m., Tommy Arthur stopped by [his] place of business" and they "talked for approximately 30 minutes." R2–36, Exh. High Aff. at 1. High commented that he did not "notice anything unusual about [Arthur]. He acted like he always did, and he did not appear to be nervous or agitated." *Id.* at 2. He said that, "about two months" after the murder, he "recalled that he had spoken to [Arthur] the morning of the murder" but never told "anybody about [the] conversation" and was "never . . . approached by the police or [Arthur's] trial or appellate attorneys." *Id.*

High's testimony was corroborated by Ray Melson, who had worked for High at Copper Mobile Homes in 1982. Melson stated that Arthur visited Copper Mobile Homes "[o]ne morning

[8] Although, in the district court, Arthur submitted affidavits of Alphonso High, Billy Peebles and Ray Melson, he relies on only those of High and Melson on appeal.

in 1982" "between 8 a.m. and 9 a.m." and that they visited for about 20 to 30 minutes. R2–41, Exh. B at 1. The following day, Melson heard the news that Troy was murdered on the same day as Arthur's visit. *Id.* at 2. He explained that, after he realized that he had seen Arthur on the morning of the murder, he and High had discussed Arthur's visit and commented that they "would have expected [Arthur] to be nervous or agitated, but he wasn't." *Id.* He said that he did not tell anyone about his visit with Arthur on the morning of the murder and was not approached by Arthur's trial or appellate attorneys. *Id.* at 2.

In response to Arthur's affidavits, the state submitted their own affidavits from High and Melson. In High's second affidavit, High stated that, "[u]pon further consideration," he could not "say for sure whether" he had seen Arthur on 1 February 1982 or another day in late January or early February of that year, and was "not sure" whether the time when he saw Arthur was at 8:30 or 9:00 A.M. R2–39, Exh. A, High Aff. Melson provided a second affidavit to "clarify some things," specifically that, although it was "true and correct" that Arthur had visited Copper Mobile Homes on a day when High and Melson were leaving to deliver a mobile home to Birmingham, he was unable to "say exactly" the day or month the visit occurred. R3–53, Exh. D at 1.

Arthur responded with affidavits to clarify or discount the second affidavits obtained from High and Melson. Arthur's attorney, Suhana Han, stated that she was told by High's assistant that one of the representatives from the Alabama Attorney General's office appeared in their office "carrying a gun in his holster." R2–41, Exh. A at 2, ¶ 5. After Han asked High for an affidavit clarifying his first affidavit, High said no and expressed concern that he had "a family to support and a business to run," and did not want to be arrested for perjury. *Id.* at 3, ¶ 6. When Arthur's investigator attempted to meet with Melson after his second affidavit, Melson "refused to speak" to them, "ordered [them] off his property," and, during a second visit, announced to them that he was "answerable" only to an Assistant Attorney General. R3–54, Exh. A, Gustat Aff. at 7–8, ¶¶ 19–20.

A habeas petitioner asserting actual innocence to avoid a procedural bar must show that his conviction "probably resulted" from "a constitutional violation." *Schlup v. Delo*, 513 U.S. 298, 327, 115 S.Ct. 851, 867, 130 L.Ed.2d 808 (1995) (quoting *Murray v. Carrier*, 477 U.S. 478, 496, 106 S.Ct. 2639, 2649, 91 L.Ed.2d 397 (1986)). The petitioner meets the "probably resulted" standard by demonstrating, based on the new evidence, "that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 327, 329, 115 S.Ct. at 867–68. The "reasonable doubt" standard is not to be determined on the basis of the district court's independent judgment, but should be based on the district court's "probabilistic determination about what reasonable, properly instructed jurors would do." *Id.* at 329, 115 S.Ct. at 868. The petitioner must support the actual innocence claim "with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Id.* at 324, 115 S.Ct. at 865. A petitioner meets the "threshold showing of innocence" justifying "a review of the merits of the constitutional claims" if the new evidence raises "sufficient doubt about [the petitioner's] guilt to undermine confidence in the result of the trial." *Id.* at 317, 115 S.Ct. at 862.

The affidavits of High and Melson contradict the testimony that Judy Wicker gave at trial that Arthur was with her, and would show that Arthur was about an hour away on the morning of the murder. *See* R2–36, Exh. Gustat Aff. at 2, ¶ 10; R3–54, Exh. A, Gustat Aff. at 4, ¶ 9. Arthur contends that both High and Melson were credible. He maintains that, during High's first meeting with the investigator, High stated that his long-term memory was better than his short-term memory, recalled the make and model of the vehicle that Arthur was driving, pounded his fist on the table for emphasis, and was not provided with any information about the murder, including the date, before he gave his recollection of his visit with Arthur. *See* R2–36, Exh. High Aff. at 1, ¶ 3; R3–54, Exh. Gustat Aff. at 4, ¶ 9; 8–9, ¶¶ 21–22. Melson corrected the details in a draft of

his initial affidavit, and spent time and energy to have his affidavit notarized. *See* R3–54, Exh. Gustat Aff. at 5–6, ¶¶ 13–15. During Melson's four separate meetings with Arthur's investigator, Melson never expressed any doubt about his statement and the investigator did not observe any indication that Melson was under the influence of pain medication. *Id.* at 2–8, ¶¶ 5–20.

Arthur argues that any inconsistencies between High's first and second affidavits can be explained by the Attorney General's threatening tactics. He maintains that the delay in presenting the evidence was caused by the constitutionally deficient performance of Arthur's counsel and the state of Alabama's failure to provide Arthur with postconviction legal assistance. The state responds that the contents of the affidavits are not "new" because Arthur has known both his whereabouts at the time of the murder and the names of the people with whom he was with at the time of the murder for over twenty years. It contends that Arthur could have presented such evidence during his third trial, when he acted as his own counsel. It also maintains that the affidavits are suspect because neither Arthur, High, nor Melson came forward with the information during Arthur's three trials or until after the district court had granted a stay of execution, and because High and Melson had recanted their statements as to the exact date on which they saw Arthur.

The new affidavits of High and Melson are insufficient to satisfy the threshold showing under *Schlup*; what little doubt they raise as to Arthur's guilt in no way undermines confidence in the result of his trial. To begin with, we observe that exclupatory affidavits "produced . . . at the 11th hour with no reasonable explanation for the nearly decade-long delay" are "suspect." *Herrera v. Collins*, 506 U.S. 390, 423, 113 S.Ct. 853, 872, 122 L.Ed.2d 203 (1993) (O'Connor, J., concurring). Such suspicion is especially warranted when, as here, certain important details of the affidavits were subsequently disavowed by the affiants themselves. The documents are substantively unimpressive as well. High and Melson's revised testimony would, at best, attack the credibility of Wicker, whose own

statements were corroborated by other witnesses and evidence submitted at trial. The district court did not clearly err in finding that Arthur was unable to meet the standard necessary to avoid a procedural bar, and to show that his conviction probably resulted from a constitutional violation.

2. *Entitlement to a Hearing and Discovery*

Arthur argues that he was entitled to develop his claim of actual innocence and that a hearing is necessary to assess the reliability of High and Melson's affidavits. He maintains that the district court erred by applying the due diligence requirement of 28 U.S.C. § 2254(e)(2) because he was seeking to establish a "gateway claim" of actual innocence to excuse his untimeliness and not a review of the merits of the claim. He also contends that he should not be held responsible for his counsel's failure to investigate or develop the record. He maintains that, because of the advancements in DNA technology since his trial, tests on the physical trial evidence could produce new evidence that could not have been developed at trial.

While his habeas petition was pending, Arthur moved for leave to conduct discovery related to his claim of actual innocence and good cause for his failure to raise the actual innocence claim in state proceedings. Specifically, he sought physical evidence from the murder[9] and documents concerning the Holman Prison death row library.[10] The district court

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[9] Arthur sought: the clothing that Wicker was wearing on the day of the murder, the rape kit created on the day of the murder, the hair samples and the wig that were recovered from Wicker's car, the hair sample and vacuum sweepings recovered from Wicker's residence, the spent cartridge casings and pillowcase found near Troy's body, the bullet recovered from Troy, and the photographs of the crime scene. R2-33, Memorandum at 8.

[10] Arthur sought a detailed list and categorization of the books, federal habeas corpus statutes, and other written materials carried by the library; the budget of the library; information concerning the typewriters, photocopying machines and writing materials available to the inmates;

denied the request for the physical crime evidence finding that the evidence regarding his actual innocence claim would "[a]t best . . . impeach Judy Wicker's testimony" and would not establish his actual innocence claim.[11] R3–55 at 7. The court denied the request for the Holman prison library evidence because it bore no relation to a constitutional claim. The district court held that Arthur was not entitled to an evidentiary hearing to question High and Melson because he had "made no attempt to show he diligently pursued the factual predicate of his alibi claim in [any] state court." *Id.* at 15.

Generally, "[a] habeas petitioner . . . is not entitled to discovery as a matter of ordinary course," but may obtain leave of court to conduct discovery pursuant to "Rules Governing Section 2254 Cases" upon showing "good cause," *Bracy*, 520 U.S. at 904, 117 S.Ct. at 1796–97, and diligence in pursuing the claim for which discovery is sought, consistent with 28 U.S.C. § 2254(e)(2). *Isaacs v. Head*, 300 F.3d 1232, 1249 (11th Cir.2002). Good cause is demonstrated "'where specific allegations . . . show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he . . . is entitled to relief.'" *Bracy*, 520 U.S. at 908–09, 117 S.Ct. at 1799 (quoting *Harris v. Nelson*, 394 U.S. 286, 300, 89 S.Ct. 1082, 1091, 22 L.Ed.2d 281 (1969)). A petitioner claiming actual, and not legal, innocence will typically show that the wrong person was convicted of the crime. *Sawyer*, 505 U.S. at

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activities and services located in or available at the library that were unrelated to reading, writing, and research; information regarding the inmates' access to the library; and the prison's document retention and destruction policy. R2–33, Memorandum at 13.

[11] The district court examined each individual discovery request. R3–55 at 5–8. Arthur sought the rape kit, Wicker's clothing, the hair samples, the wig, and the vacuum sweepings to discredit Wicker's testimony during his third trial. *Id.* at 6–7, n. 6. He sought the cartridge casings and bullet to show inconsistencies with the trial testimony that the type of bullets that he purchased and the cartridges and bullet found at the crime scene. He sought the pillowcase and crime scene photographs to dispute expert testimony that Troy was shot at a close range. Similar evidence was, however, presented during the trial and weighed by the jury in their consideration during the guilt phase.

339–41, 112 S.Ct. at 2519–20. A district court's denial of discovery is reviewed for abuse of discretion where the petitioner has shown "'good cause' for the discovery.'" *Bracy*, 520 U.S. at 909, 117 S.Ct. at 1799(citation omitted).

In reviewing a state writ of habeas corpus in which the petitioner failed to develop the factual basis for a claim in the state court proceedings, the district court

> shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> (A) the claim relies on—
>
> . . . .
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2). In this statute, "Congress has given prisoners who fall within § 2254(e)(2)'s opening clause an opportunity to obtain an evidentiary hearing where the legal or factual basis of the claims did not exist at the time of state-court proceedings." *Williams v. Taylor*, 529 U.S. 420, 436, 120 S.Ct. 1479, 1490, 146 L.Ed.2d 435 (2000). "[A] failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Id.* at 432, 120 S.Ct. at 1488.

> The question is not whether the facts could have been discovered but instead whether the prisoner was diligent in his efforts . . . . Diligence for purposes of the opening clause depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court; it does not depend . . . upon whether those efforts could have been successful. Though lack of diligence will not bar an

> evidentiary hearing if efforts to discover the facts would have been in vain, and there is a convincing claim of innocence, only a prisoner who has neglected his rights in state court need satisfy these conditions.

Id. at 435, 120 S.Ct. at 1490 (citations omitted).[12] Although a defendant represented by constitutionally ineffective counsel will not be held responsible for attorney error, the claim of ineffective assistance of counsel must have first been presented to the state court before it can be used to establish cause for the default. *Murray*, 477 U.S. at 488–89, 106 S.Ct. at 2645–46. A district court properly applies § 2254(e)(2)'s diligence requirement in determining whether to conduct an evidentiary hearing. *Isaacs*, 300 F.3d at 1248–49.

Arthur failed to satisfy the diligence requirement of § 2254 both as to the requested discovery and as to the evidentiary hearing. He failed to pursue the testing of the requested crime-related physical evidence during his three trials or through a state postconviction relief petition. *See id.* at 1249–50 (affirming the denial of an evidentiary hearing where the petitioner knew of the factual basis at the time of his state appeal, and had multiple opportunities to raise the issue during state court proceedings over a period of ten years). He failed to show that his claim of actual innocence was unavailable to him before the statute of limitation expired. He also failed to demonstrate "good cause" for his failure to seek the requested crime-related discovery. Accordingly, the district court did not abuse its discretion in denying Arthur's request for discovery and an evidentiary hearing.

3. *Statutory Tolling*

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[12] A claim is not precluded under § 2254(e)(2) "unless the undeveloped record [on the factual basis of a petitioner's claim] is a result of his own decision or omission." *McDonald v. Johnson*, 139 F.3d 1056, 1059 (5th Cir.1998).

Arthur argues that statutory tolling should apply because Alabama unconstitutionally failed to provide him with state postconviction counsel, any other form of legal assistance, or access to an adequate law library. He contends that he suffered actual harm as a result of not having counsel because he has received no state or federal postconviction review of the merits of his claims. He maintains that his habeas petition is timely because, since he was unable to locate pro bono counsel until October 2000, the federal period of limitations did not end until October 2001. He claims that he suffered an actual injury from the inadequacies in the prison law library because he was unable to timely prepare and file a state postconviction petition and a federal petition for writ of habeas corpus. He asserts that this injury resulted from Alabama's failure to provide him with the procedures for requesting materials and history of providing the requested materials only after an adequate habeas corpus petition was filed.

The district court denied Arthur's claim of statutory tolling, holding that the state did not unconstitutionally impede the timely filing of Arthur's federal habeas petition. It found that, because Arthur "did not avail himself of the [Alabama] procedure for obtaining [postconviction] counsel," he could not show that he would have been denied counsel if he had pursued such relief, and that Arthur had "provided no support" for his claim that Holman Prison death row inmates were provided inadequate access to the library. R3–55 at 20. It also found that Arthur's evidence that he was unable to obtain private counsel did not satisfy his burden of showing that he suffered an actual injury from the Alabama procedure for obtaining postconviction counsel.

A person in state custody filing a petition for writ of habeas corpus is subject to a one-year statute of limitation which

> shall run from the latest of—
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action.

28 U.S.C. § 2244(d)(1). Thus, if the petitioner was prevented from filing his habeas corpus petition as a result of "illegal state action," the limitation period will not begin until the state impediment is removed. *Wyzykowski*, 226 F.3d at 1216.

Prisoners, including those under a sentence of death, have no constitutional right to the appointment of counsel for postconviction proceedings. *Murray v. Giarratano*, 492 U.S. 1, 10, 12, 109 S.Ct. 2765, 2771–72, 106 L.Ed.2d 1 (1989) (holding that *Pennsylvania v. Finley*, 481 U.S. 551, 555–57, 107 S.Ct. 1990, 1993–94, 95 L.Ed.2d 539 (1987) applied to death penalty cases).[13] We have declined to find an exception even "when the state collateral proceeding was the petitioner's first opportunity to raise the claim." *Hill v. Jones*, 81 F.3d 1015, 1025–26 (11th Cir.1996).

Such an exception is unnecessary, however, because Alabama provides for the appointment of counsel for a petitioner seeking postconviction relief. An indigent petitioner, who desires the assistance of counsel, may seek appointment of counsel if the petitioner's postconviction relief petition is not summarily dismissed. Ala. R.Crim. P. 32.7(c).[14] Similarly, an

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[13] *See also Coleman v. Thompson*, 501 U.S. 722, 752, 111 S.Ct. 2546, 2566, 115 L.Ed.2d 640 (1991) ("[A] petitioner cannot claim constitutionally ineffective assistance of counsel" "in state post-conviction proceedings" because "[t]here is no constitutional right to an attorney" in such proceedings); *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 281, 118 S.Ct. 1244, 1250, 140 L.Ed.2d 387 (1998) (recognizing that the Supreme Court had "generally rejected attempts to expand" distinctions accorded capital inmates including a constitutional right to counsel in postconviction proceedings).

[14] Although Alabama suggests that a post-conviction petitioner "need only fill in the form Rule 32 petition" to obtain appointed counsel, Appellee's Brief at 39 n.10, that form does not provide any information or questions regarding the need for appointment of counsel. *See* Ala.

indigent federal habeas corpus petitioner, seeking relief from a judgment punishable by death, has a mandatory statutory right to appointed counsel from the district court upon filing a motion requesting such appointment. 21 U.S.C. 848(q)(4)(B), 28 U.S.C. §§ 2254(h) and 2261; 18 U.S.C. § 3006A(a)(2)(B); *McFarland v. Scott*, 512 U.S. 849, 858–59, 114 S.Ct. 2568, 2573–74, 129 L.Ed.2d 666 (1994).

To guarantee prisoners their constitutional right of access to the courts, prison authorities are required to provide prisoners with adequate law libraries or legally trained assistance to prepare and file meaningful legal papers. *Bounds v. Smith*, 430 U.S. 817, 828, 97 S.Ct. 1491, 1498, 52 L.Ed.2d 72 (1977). The primary focus is to "protect[] the ability of an inmate to prepare a petition or complaint, [and] it is irrelevant" that the state provides for the appointment of counsel in some proceedings. *Id.* at 828 n. 17, 97 S. Ct. at 1498 n. 17 (internal quotations and citation omitted). The required prison law library must supply the tools and, thus, "a capability" "that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement." *Lewis v. Casey*, 518 U.S. 343, 355–56, 116 S.Ct. 2174, 2182, 135 L.Ed.2d 606 (1996). An inmate who shows that a desired actionable challenge to his sentence was "lost or rejected . . . because th[e] capability of filing suit [w]as not . . . provided, . . . demonstrates that the State has failed to furnish *adequate* law libraries or *adequate* assistance from persons trained in the law." *Id.*, 116 S.Ct. at 2182 (internal punctuation and citation omitted).

Arthur did not seek appointment of counsel under Alabama Rule of Criminal Procedure 32.7(c) or 28 U.S.C. § 2254(h), but instead sought counsel through letters to various organizations and postings on the internet. In the letters and internet postings, he asked that the case not be referred to either the Southern Center for Human Rights in Atlanta, Georgia, or to the Equal

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R.Crim. P. 32, App., Petition for Relief from Conviction or Sentence at In Forma Pauperis Declaration.

Justice Initiative of Alabama, in Montgomery, Alabama.[15] The statute of limitation expired during his search. Arthur provided no reasons in his petition for not filing a *pro se* petition while seeking counsel. The Holman Prison law library has one room reserved for death row inmates. R2–40, Exh. G. The death row room is "used more as a day room" instead of a library and contains legal materials which are neither maintained nor updated. *Id.* If a death row inmate needs specific materials, the inmate can request the materials from the maintained and current library. *Id.* The materials were, therefore, available to Arthur upon his request. Further, Arthur was aware of time limits for filing his petition and the consequences for missing those times. In an internet posting seeking counsel, Arthur asked for "help . . . now I'm running out of time for appeals." R2–40, Exh. E (also stating "the time for appeal on my case is critical to me.") Based on the record, we cannot say that the district court clearly erred in finding that Arthur failed to avail himself of the Alabama procedures for obtaining postconviction counsel or to show that he was provided inadequate access to the prison law library, or abused its discretion in denying Arthur statutory tolling relief.

4. *Equitable Tolling*

Arthur argues that equitable tolling is warranted and that we should apply a more lax standard in capital cases because of the heightened importance of the potential punishment. He contends that he never received notice of the judgment which triggered the limitations period, and was unable to file a timely petition as he was not represented by counsel. He maintains that extraordinary circumstances are presented because Alabama cannot appoint counsel for postconviction proceedings

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[15] Arthur stated that his past experiences with these organizations were "unpleasant and non-productive" and that they did "not have the proper funding or staff to handle" their cases. R2–40, Exh. D at 1. He commented that "Alabama's court-appointed attorneys don't get paid enough to care." *Id.* at 2.

until after the filing of a petition containing the grounds with "full disclosure of the factual basis for those grounds." Ala. R.Crim. P. 32.6(b), 32.7(c). He maintains that he was unable to obtain the alibi evidence which he seeks to present until after his current counsel performed an extensive factual investigation. He claims that he was placed in a "Catch-22" situation when he was prevented from meeting with an investigator without obtaining counsel, and was unable to obtain counsel until he had set forth the factual basis for his claim or met with an investigator.

In the district court, Arthur argued that his failure to file a timely petition was due to Alabama's failure to provide him with notice of judgment, legal assistance, visits with investigators, or an adequate law library. The district court noted that Alabama's evidence tended to show that Arthur was aware of the Alabama Supreme Court's final ruling, even though no certificate of judgment issued on 7 April 1998. It found that, in light of the long period of time in which Arthur did nothing, Arthur had not demonstrated diligence in obtaining the status of his Alabama Supreme Court appeal. It also found that Arthur had not demonstrated that the lack of notice prevented him from timely filing a petition. It found that Arthur's efforts to obtain private counsel and to meet with private investigators did not show diligence in pursuing his habeas claims. It found that, because Arthur had not shown that he was denied materials from the general prison library or had made any independent efforts to learn of the limitations period, he failed to show that the circumstances were outside of his control and that he was diligent. It concluded that, even in combination, the factors did not show extraordinary circumstances or that Arthur had exercised due diligence to warrant equitable tolling. R3–55 at 21–25.

In a letter received by the United States Supreme Court on 11 June 1998, Arthur stated that he had been informed that he had 90 days from the Alabama Supreme Court's "final ruling" of 20 March 1998 "to file some sort of document" in the United States Supreme Court. R2–40, Exh. C at 1. He explained that he had spent time "trying to get exact-correct mailing address"

for the Supreme Court, had received the address on 2 June 1998, and had been unable to mail the letter at that time because he had used his weekly mail allowance. *Id.* He said that he did not have an attorney but was "trying desperately to get one using every mailing allowance" writing to organizations requesting representation. *Id.* at 2. He requested an extension of six months to one year to allow for him to obtain counsel and for the attorney to become familiar with Arthur's case, or 30 days to allow him to submit something on his own.[16] Arthur did not subsequently file a petition for writ of certiorari to the Supreme Court.

In April 2000, legal investigators Robert C. Long and Glenn Taylor requested permission to visit Arthur "to investigate certain aspects of his case and [for the purpose] of obtaining legal counsel for him." R2–40, Exh. F at 1. Two days later, the Holman Correctional Facility warden advised Long that the request was "not approved" and that "[v]isits for investigators are allowed, but by attorney request." *Id.* at 2. In May 2000, attorney James G. Curenton wrote to the prison, indicating that he was "contemplating representing" Arthur and requested permission for his investigators to "visit . . . and interview" Arthur. *Id.* at 3. The next day, the warden responded that Curenton would be accommodated "[w]hen and if you make a decision to become . . . Arthur's attorney or wish to come see him yourself" but that he could not "at this time . . . approve investigators" to visit Arthur. *Id.* at 4.

After the Alabama Supreme Court's 20 March 1998 affirmance of the Alabama Court of Criminal Appeal's decision affirming Arthur's conviction, a "certificate of judgment" was to have issued 18 days later, which was 7 April 1998. *See* Ala. R.App. P. 41(a). It is unclear when or how Arthur received information of the Alabama Supreme Court's decision, but in any event, he was aware of it when he wrote to the United States Supreme Court on 2 June 1998, and believed that he had

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[16] The record does not contain a response from the Supreme Court to this letter.

until 20 June 1998 to file his petition for writ of certiorari. He did not, however, timely file such a petition.

The time period specified in 28 U.S.C. § 2244 "is a statute of limitations [and] not a jurisdictional bar," which "permits equitable tolling when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir.2000) (internal quotations and citation omitted). As an extraordinary remedy, equitable tolling "is typically applied sparingly." *Id.* It may be applied if the petitioner demonstrates (1) diligence in his efforts to timely file a habeas petition and (2) extraordinary and unavoidable circumstances. *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir.1999) (per curiam). A petitioner is not entitled to equitable tolling based on a showing of either extraordinary circumstances or diligence alone; the petitioner must establish both. *Pace v. DiGuglielmo*, 544 U.S. 408, 125 S.Ct. 1807, 1815, 161 L.Ed.2d 669 (2005); *Justice v. United States*, 6 F.3d 1474, 1478–79 (11th Cir.1993). We review the district court's legal decision on equitable tolling *de novo* and factual determinations, including that of diligence, for clear error. *Lawrence v. Florida*, 421 F.3d 1221, 1224–25 (11th Cir.2005), *cert. granted on other grounds*, —— U.S. ——, 126 S.Ct. 1625, 164 L.Ed.2d 332 (2006).[17]

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[17] The questions presented on certiorari are: (1) whether a death penalty defendant's petition for writ of certiorari to the Supreme Court to review the validity of the denial of his state petition for postconviction relief toll the § 2244 statute of limitations; (2) whether the split in the circuits concerning the tolling of the statute of limitations constitutes an "extraordinary circumstance" entitling a diligent defendant to equitable tolling while his claim is being considered by the Supreme Court on certiorari; (3) whether the special circumstance of "registry counsel," statutorily mandated to file appropriate motions in a timely manner, advising the defendant about the statute of limitations constitute an "extraordinary circumstance" beyond the defendant's control and thus entitle the defendant to equitable tolling. *Lawrence v. Florida*, — U.S. —, 126 S.Ct. 1625, 164 L.Ed.2d 332 (2006).

A determination as to whether rare and exceptional circumstances are presented requires the examination of the facts in each case. *Knight v. Schofield*, 292 F.3d 709, 711 (11th Cir.2002) (per curiam). The focus of the inquiry regarding "extraordinary circumstances" is "on the circumstances surrounding the late filing of the habeas petition" and not on the circumstances of the underlying conviction, *Helton v. Secretary for the Dep't. of Corr.*, 259 F.3d 1310, 1314–15 (11th Cir.2001) (per curiam), and whether the conduct of others prevented the petitioner from timely filing, *see Lawrence*, 421 F.3d at 1226.[18]

To show diligence, a petitioner claiming deficiencies in the prison law library must provide details of the specific actions taken toward filing the petition. *Helton*, 259 F.3d at 1314. He must show "when he found out about the library's alleged deficiency," must "state any independent efforts he made to determine when the relevant limitations period began to run," and must demonstrate how the prison "thwarted his efforts." *Id.* Absent such evidence, the connection between the petitioner's untimely filing and any alleged inadequacies in the library is insufficient. *Id.*

The record shows that Arthur was aware of the deadline to file his habeas petition and that, although he continued to seek counsel, he neither timely filed a pro se petition for postconviction relief nor filed a motion seeking the appointment of counsel. Although he may have been unable to present the testimony of the alibi witnesses until an investigation had been

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[18] *See also Kreutzer v. Bowersox*, 231 F.3d 460, 463 (8th Cir.2000) (no equitable tolling where "nothing in the record which suggests the respondent has lulled [petitioner] into inaction" and a district court order granting an extension was entered two days after the statute of limitations expired); *Flanders v. Graves*, 299 F.3d 974, 977 (8th Cir.2002) (no equitable tolling where petitioner failed to show that the respondents made it impossible or difficult for him to uncover the facts underlying the actual innocence claim or prevented him from timely filing his habeas petition); *Cantu-Tzin v. Johnson*, 162 F.3d 295, 299 (5th Cir.1998) (no equitable tolling where petitioner chose "self-representation rather than the choice he was offered by the state" and then, "[o]nce he was ordered to proceed . . . pro se [petitioner] . . . did nothing.")

performed, he was in a position to proffer the names of the individuals with whom he spoke on the day of the murder. The record does not reflect any "repeated" efforts to learn the status of his case or any acts by others which prevented him from timely filing his petition. In fact, the record does not reflect any specific actions, other than seeking pro bono counsel and requesting an extension of time to file a petition for writ of certiorari, that Arthur took to timely file a petition for postconviction relief, to seek counsel through either the state or federal avenues available to him, to obtain the information regarding the limitations period (or the options for seeking counsel through the state or federal systems) from the prison library or to gain the assistance of others, outside of prison, who had the ability to obtain the information for him. Absent any such evidence of diligence,—the district court did not clearly err in finding that Arthur was not entitled to equitable relief.

V. CONCLUSION

Arthur has not shown that he has any legal grounds excusing the untimeliness of his habeas petition and thus entitling him to consideration of the merits of it. He has not established that he is actually innocent or that the district court erred in denying him discovery and an evidentiary hearing on his claim of actual innocence. He has not established that statutory tolling should be applied to the statute of limitations governing his claims. He has not established that equitable tolling should be applied to the statute of limitations governing his claims or that the district court abused its discretion in denying discovery on his equitable tolling claim. Accordingly, we affirm the district court's judgement denying Arthur habeas relief.

AFFIRMED.

Thomas D. ARTHUR, Petitioner–Appellant,

v.

Richard F. ALLEN, Commissioner, Alabama Department of Corrections, Respondent–Appellee.

No. 03–14304.

United States Court of Appeals, Eleventh Circuit.
Aug. 14, 2006.

Suhana S. Han, Sullivan & Cromwell, LLP, Theresa Marie Trzaskoma, Brune & Richard, LLP, New York City, for Arthur.

J. Clayton Crenshaw, Montgomery, AL, for Allen

On Appeal from the United States District Court for the Middle District of Alabama (No. 01-00983-CV-N-S); L. Scott Coogler, Judge.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion June 21, 2006, 11th Cir., 2006, 452 F.3d 1234)

Before BIRCH, BLACK and BARKETT, Circuit Judges.

PER CURIAM:

Upon consideration of the petitioner-appellant's petition for rehearing, the opinion, *Arthur v. Allen*, 452 F.3d 1234 (11th Cir.2006), we make the following modifications.

The discussion and analysis that follows the second paragraph under IV. DISCUSSION, B. *Arthur's Claims of Exception to the Statute of Limitations*, 2. Entitlement to a Hearing and Discovery, 452 F.3d 1234 at 1247–48, is deleted, and the following is substituted in its place:

Generally, "[a] habeas petitioner . . . is not entitled to discovery as a matter of ordinary course," but may be obtained upon showing "good cause," *Bracy*, 520 U.S. at 904, 117 S.Ct. at 1796-97, to believe that the evidence sought would "raise[] sufficient doubt about [his] guilt to undermine confidence in the result of the trial."[1] *Schlup*, 513 U.S. at 317, 115 S. Ct. at 862. Good cause is demonstrated "'where specific allegations . . . show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he . . . is entitled to relief.'" *Bracy*, 520 U.S. at 908–09, 117 S.Ct. at 1799 (quoting *Harris v. Nelson*, 394 U.S. 286, 300, 89 S.Ct. 1082, 1091, 22 L.Ed.2d 281 (1969)). Thus, good cause for discovery cannot arise from mere speculation. It is not enough, for example, to allege that "DNA testing could demonstrate that the same person who raped Judy Wicker also physically assaulted her, that this person's blood was on her blouse, that his hair was found in the Wicker residence, that he was in Judy Wicker's 1981 Buick Riveria, and that this person was not Mr. Arthur." Arthur's Petition for Rehearing at 14.

Recognizing that discovery cannot be ordered on the basis of pure hypothesis, Arthur's request relies heavily on the affidavits of High and Melson. But the credibility of those documents is fundamentally wounded by the affiants' own substantial retraction of the very content advanced to support Arthur's new alibi. For this reason, the affidavits do not furnish good cause to believe that the facts, if "fully developed" through the discovery sought, would be any different from those found at trial. *See*

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[1] We recognize that the provisions of 18 U.S.C. § 2254(e)(2) for obtaining an evidentiary hearing are not applicable to a petitioner's first federal habeas petition seeking review of a defaulted claim based on an allegation of actual innocence. *House v. Bell*, — U.S. — , 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006); *Sibley v. Culliver*, 377 F.3d 1196, 1207 (11th Cir.2004).

Bracy, 520 U.S. at 909, 117 S.Ct. at 1799. The district court did not abuse its discretion in denying Arthur's request for discovery and an evidentiary hearing.

In all other respects, the petition for rehearing and rehearing en banc is DENIED.

DEPARTMENT OF FORENSIC SCIENCES
HUNTSVILLE DIVISION
P.O. BOX 120
HUNTSVILLE, ALABAMA 35804

CARLOS L. RABREN AUBURN
DIRECTOR
March 16, 1982

Re: Case 02-82-15167
Judy Wicker, subject
Ref: 82-20615 HV

MEMORANDUM		To File
BY		Roger Morrison, Criminalist
SUBJECT		Examination of Physical Evidence

February 3, 1982, at 1700 hours, the following evidence was received from Criminalist J.G. Wallace for analysis:

1. One sealed MARKIT Rape Kit labeled in part with the subject's name and containing:
   a. one red-stoppered vial of blood identified as from Judy Wicker.
   b. fingernail scrapings.
   c. head hair sample.
   d. saliva sample.
   e. pubic hair combings.
   f. pubic hair sample.
   g. vaginal swabs and slides.

RESULTS:

The blood sample from Judy Wicker reacted in a manner consistent with ABO group A blood.

No debris was observed in the fingernail scrapings.

The saliva sample was bloody, however, it reacted in a manner consistent with having come from a group A secretor.

No hairs were found in the pubic hair combings.

A small number of spermatozoa were identified in the vaginal swabs and slides. A and H antigens were detected in the vaginal swab.

RDM:shs

s/ Roger Morrison

"FORENSIC SCIENCES INVOLVE THE APPLICATION OF SCIENCE AND MEDICINE TO THE PURPOSES OF JUSTICE"

STATE OF ALABAMA
DEPARTMENT OF FORENSIC SCIENCES
FLORENCE DIVISION
P.O. BOX 2234
FLORENCE, ALABAMA 35630

April 28, 1982

VAN V. PRUITT, JR., AUBURN
ASSISTANT DIRECTOR
JOHN H. KILBOURN, FLORENCE
LABORATORY SUPERVISOR
(205) 767-0710

Re: Case 01A-82-20615
Troy Wicker, Jr., subject
Case 02-82-15167
Judy Wicker, subject

MEMORANDUM		To File
BY		J. G. Wallace, Criminalist
SUBJECT		Examination of Scene

February 1, 1982, at 1015 hours, the undersigned was requested to examine a residence located at 301 Highland Avenue, Muscle Shoals, Alabama by Lieutenant Robert Hall of the Muscle Shoals Police Department.

Examination of the interior of the house revealed it to be in complete disarray. Closet, drawer and cabinet contents were on the floor.

The bed in the rear bedroom contained the body of a white male identified as Troy Wicker, Jr. The body was positioned on its back with the bed covers pulled up to chest level.

Numerous black particles were noted on the bed, along with four spent cartridge casings. Numerous reddish-brown stains, appearing to be blood, were located on the wall behind the head of the body.

The den area of the house contained, along with other things, one pair of pants, one blouse and a pair of panties.

The house was examined for the presence of latent fingerprints and the following items were removed and returned to the laboratory:

1. Four spent cartridge casings removed from bed
2. One pillow and pillow case removed from under the head of the body
3. One billfold with numerous pictures and paper removed from floor in rear bedroom
4. One can of Consort hair spray removed from bathroom located off rear bedroom
5. One small wooden box from rear bedroom closet
6. One hand mirror removed from bathroom located off hall
7. One can of Style hair spray removed from bathroom located off hall
8. Three cups and ten glasses removed from floor adjacent to kitchen
9. One cookie jar removed from kitchen
10. One Crisco can removed from kitchen
11. One peanut butter jar removed from kitchen
12. One popcorn jar removed from kitchen
13. One vase and top removed from den
14. Sample of carpet fibers from den floor

15. Clothes (pants, blouse and panties) removed from den floor

16. One cigarette butt from den floor

17. One nail clipping from den floor

The following latent print lifts of value were removed from the house or from items removed from the house and transferred to the Identification Unit of the Alabama Bureau of Investigation in Montgomery, Alabama. The results of their examination are covered in separate reports to this file.

1. Nine latent fingerprint lifts from a popcorn jar found in the kitchen. These prints are identified by ABI as Lat. #'s 1, 2, 3, 4, 11, 12, 19, 20, 21.

2. One latent lift from a hand mirror found in the hall bathroom and identified by ABI as Lat. #5

3. Three latent lifts from the vase removed from den and identified by ABI as Lat. #'s 6, 7, 8

4. One latent lift from the vase top and identified by ABI as Lat. #9

5. One latent lift removed from the mirror in the bathroom located off the rear bedroom and identified by ABI as Lat. #10

6. Three latent lifts removed from the Style hair spray can and identified by ABI as Lat #'s 13, 14, 15

7. Three latent lifts removed from the Crisco can and identified by ABI as Lat. #'s 16, 17, 18

8. One latent lift removed from the peanut butter jar and identified by ABI as Lat. #22

9. Two latent lifts removed from cookie jar and identified by ABI as Lat. #'s 23, 24

10. One latent lift removed from hall bathroom vanity top and identified by ABI as Lat. #25

11. One latent lift removed from the top of the clothes dryer and identified by ABI as Lat. #27
12. One latent lift removed from the top of the dresser located in the rear bedroom and identified by ABI as Lat. #28

Examination of the Consort hai spray can, wooden box, cups and glasses revealed no latent prints of value.

On the same day, Lieutenant Tom Berryman of the Muscle Shoals Police Department submitted one rape kit bearing the name Judy Wicker.

February 2, 1982, the undersigned returned to the house located at 301 Highland Avenue and removed vacuum sweepings from the den carpet and one hair removed from a bedroom slipper found in the den.

The following items were transferred to the Huntsville Laboratory. Their findings are covered in separate memoranda to this file.

1. One rape kit bearing the name Judy Wicker and clothing from den floor
2. Four spent cartridge casings
3. One pillow case removed from bed under head of the body
4. Carpet fibers from den floor
5. Vacuum sweepings from den floor
6. Hair removed from slipper on den floor

JGW:rd

s/ J.G. Wallace

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

THOMAS D. ARTHUR,	)	
Petitioner,	)	
vs.	)	
	)	
MICHAEL HALEY,	)	
Commissioner, Alabama Department of Corrections,	)	Case No. CV-01-N-983-S
Respondent.	)	

AFFIDAVIT OF ALPHONSO HIGH, III

STATE OF ALABAMA)
) ss:
COUNTY OF MADISON)

ALPHONSO HIGH, III, being first duly sworn to oath, deposes and says:

1. I reside at 2317 Powers Avenue, N.W. Huntsville, Alabama and currently own Copper's Homes, located at 5710 Highway 53 Harvest, Alabama.

2. In 1982, I owned Copper Mobile Homes, located in Decatur, Alabama off of Highway 67 (Beltline) in a shopping mall.

3. On the morning of February 1, 1982 around 9 a.m., Tommy Arthur stopped by my business and I believe he was driving his Ford LTD. We talked for approximately 30 minutes about the mobile home business and he asked if I had any work for him. I told him that I didn't and that I was on my way to

Birmingham, Alabama. He asked what I was going to do in Birmingham and I told him that I had a trailer to set up.

4. During our conversation, I didn't notice anything unusual about Tommy. He acted like he always did, and he did not appear to be nervous or agitated.

5. The following day I heard about the murder of Troy Wicker, either by watching television or talking to someone. I never gave it any more thought until about two months later when I heard that Tommy Arthur had been arrested for murder. I began thinking about Tommy and the date of the murder. It was then that I recalled that I had spoken to Tommy the morning of the murder.

6. I did not tell anybody about my conversation with Tommy on the morning of February 1, 1982 with Mr. Arthur. I had never been approached by the police or Tommy's trial or appellate attorneys.

Dated: June 7th, 2002

s/ Alphonso High, III
Alphonso High, III

SWORN TO AND SUBSCRIBED before
me this 7th day of June, 2002.

Notary Public s/ Teresa McDonald
My Commission Expires: 09/28/04

STATE OF ALABAMA)
)
COUNTY OF MADISON)

AFFIDAVIT OF ALPHONSO HIGH III

Before me, the undersigned authority, this day personally appeared Alphonso High III, who is known to me and who after being by me first duly sworn does depose and says as follows:

"My name is Alphonso High III. I have previously provided an affidavit in a federal habeas proceeding relating to Thomas D. Arthur."

"In early May 2002, I was contacted by Stephen J. Gustat. It was my understanding that Mr. Gustat was an investigator for Tommy Arthur. Because I have known Tommy Arthur since 1971, I was willing to provide any assistance to Mr. Gustat that I could. I did agree to provide an affidavit. In early June 2002, Mr. Gustat arrived at my place of business with a previously prepared affidavit."

"It was stated in my previous affidavit that I saw Tommy Arthur on the morning of February 1, 1982, around 9:00 a.m. at my place of business. Upon further consideration, I cannot say for sure whether I saw Tommy Arthur on February 1, 1982, or whether it was another day in late January or early February of that same year. I am also not sure whether it was 8:30 or 9:00 o'clock in the morning the day that I saw him."

Further affiant sayeth not.

s/ Alphonso High III
Alphonso High III

STATE OF ALABAMA)
)
COUNTY OF MADISON)

Sworn to before me on this the 19th day of June, 2002.

s/ Teresa McDonald
NOTARY PUBLIC

My commission expires: Sept. 28, 2004

STATE OF ALABAMA)
)
COUNTY OF ESCAMBIA)

AFFIDAVIT OF NAOMI LYONS

Before me, the undersigned authority, this day personally appeared Naomi Lyons, who is known to me and who after being by me first duly sworn does depose and says as follows:

"My name is Naomi Lyons. I am a correctional officer with the Alabama Department of Corrections. I am assigned to the inmate Control Services ("ICS") at Holman State Prison. I have worked in this capacity since 1997. Part of my duties at the prison is to oversee the prison law library."

"At Holman State Prison, there is one law library. There is a room for the death row inmates that also contains legal books, but this is not a law library that is maintained and kept current. This room is used more as a day room. The legal books kept in that room are there only as a convenience to the inmates. If there is a legal book that is not in the day room, the death row inmates may request the book from the prison law library. The prison law library, which contains the United States Code, has been maintained current and up-to-date."

Further affiant sayeth not.

s/ Naomi Lyons
Naomi Lyons

STATE OF ALABAMA)
)
COUNTY OF ESCAMBIA)

Sworn to before me on this the 21 day of June, 2002.

s/ C. Williams Jr.
NOTARY PUBLIC

My commission expires: 7/7/04

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

THOMAS D. ARTHUR,	)	
Petitioner,	)	
vs.	)	
	)	
MICHAEL HALEY,	)	
Commissioner, Alabama Department of Corrections,	)	Case No. CV-01-N-983-S
Respondent.	)	

DECLARATION OF SUHANA S. HAN

I, Suhana S. Han, declare the following under penalty of perjury:

1. I am an attorney assisting Arnold J. Levine, counsel of record for Petitioner Thomas D. Arthur, in this action. I submit this declaration in further support of Mr. Arthur's Petition for a Writ of Habeas Corpus.

2. On May 3, 2002, an investigator assisting Mr. Arthur's counsel interviewed Alphonso High in connection with this case at Mr. High's home in Huntsville, Alabama. During that interview, which lasted for about 30 minutes, I understand that Mr. High informed the investigator that he had seen Mr. Arthur at Copper Mobile Homes in Decatur around 9 a.m. on the morning of Troy Wicker's murder. I further understand that Mr. High recalled that, at the time of Mr. Arthur's arrest, Mr. High knew that he had seen Mr. Arthur on the morning of the murder. Even at the time of his interview in 2002, Mr. High was so sure about his recollection that he pounded his fist on the

kitchen table for emphasis and was able to recall particular details of his activities of the day in question.

3. On June 7, 2002 during the afternoon, Mr. Arthur's investigator met with Mr. High at Copper's Homes in Harvest, Alabama. The investigator presented Mr. High with a draft of an affidavit that counsel had prepared based on the information Mr. High had given during the interview. I understand that Mr. High's assistant, Teresa McDonald, reviewed the draft and made some changes, that the investigator and Ms. McDonald read the changes to Mr. High, and Mr. High also reviewed each page slowly before signing it. I was informed that this process took about three hours.

4. When I received Mr. High's second affidavit, dated June 19, 2002, which had been procured through the efforts of Respondent's counsel, I was concerned and believed that a full inquiry was warranted. In accordance with my ethical obligations to ensure that the Court receives testimony that is reliable, accurate and uncoerced, I decided to meet with Mr. High to determine whether his first affidavit was truthful, or whether it was untruthful and therefore needed to be withdrawn.

5. On July 16, 2002, I went to Copper's Homes and met with Mr. High to discuss his second affidavit. Mr. High's assistant, Teresa McDonald, told me that two men from the Attorney General's office had stopped by at Copper's Homes; one brought a laptop computer and the other was carrying a gun in his holster. I was also told that one of the men typed up the affidavit that same day and Mr. High signed it. When I asked Mr. High about the information he had provided in his first affidavit, he told me that although he could recall the *sequence of events*, that is, that he had spoken with Mr. Arthur one morning at 8:30 a.m. or 9 a.m. and heard the next day that a man was murdered while sleeping, he could no longer recall the *exact dates* some 20 years ago when those events had occurred.

6. On July 17, 2002, I returned to Copper's Homes again to speak to Mr High. I asked him whether he would be willing to sign another affidavit describing his recollection of

Mr. Arthur's visit without mentioning the February 1, 1982 date. Mr. High said that he did not want to sign another affidavit. He emphasized that he has a family to support and a business to run, and that he did not want to get involved in any proceeding that could take him away from his business indefinitely. Mr. High also said that he did not want to be "carried away" in handcuffs or go to jail for perjury. At no time did Mr. High present any information to indicate that he was being untruthful with respect to the material facts in his initial affidavit.

7. Based upon this conversation, I believe that Mr. High fears that testifying on behalf of Mr. Arthur would result in economic loss, harassment, or even prosecution by the State of Alabama.

8. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the forgoing is true and correct.

Dated: August 14, 2002

s/ Suhana S. Han
Suhana S. Han
125 Broad Street
New York, New York 10004

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

THOMAS D. ARTHUR, Petitioner, vs. MICHAEL HALEY, Commissioner, Alabama Department of Corrections, Respondent.	)	Case No. CV-01-N-983-S

AFFIDAVIT OF RAY MELSON

STATE OF ALABAMA)
) ss:
COUNTY OF MORGAN)

RAY MELSON, being first duly sworn to oath, deposes and says:

1. In 1982, I worked for Alphonso High, who at the time owned Copper Mobile Homes in Decatur. One morning in 1982, as we were preparing for a trip to Birmingham to set up a double-wide trailer, Tommy Arthur visited Copper Mobile Homes between 8 a.m. and 9 a.m. We had just finished our breakfast of biscuits and coffee.

2. We talked with Tommy for about 20 to 30 minutes. He did not appear nervous and seemed like his usual self. Tommy asked us where we were going, and Alphonso told him that we were on our way to Birmingham to set up a trailer. Tommy volunteered to go with us but Alphonso said that he did not need additional help. On our way to Birmingham,

Alphonso joked about how Tommy tried to get himself hired. After we had set up the trailer, we returned to Decatur and played a game of Rook.

3. The day after Tommy visited Copper Mobile Homes, I heard on the television news that a man had been shot while sleeping and that the murder had occurred the previous day (on the day of Tommy's visit). I later learned that the man who had been shot was Troy Wicker.

4. When I heard that Tommy had been arrested for Troy Wicker's murder, I realized that I had seen Tommy on the morning of the murder. In fact, at the time, Alphonso and I discussed that we had seen Tommy on the morning of Troy Wicker's murder, and that we would have expected Tommy to be nervous or agitated, but he wasn't.

5. I have not spoken to anybody in the past 20 years about my conversation with Tommy Arthur on the morning of Troy Wicker's murder.

6. I did not tell Tommy's trial and appellate lawyers about my conversation with Tommy on the morning of Troy Wicker's murder because they never approached me.

7. I have reviewed this affidavit and its contents are true to the best of my knowledge.

Dated: August 2, 2002

s/ Ray Melson
Ray Melson

SWORN TO AND SUBSCRIBED before
me this 2nd day of August, 2002.

Notary Public s/ Kelly Dean
My Commission Expires: _____

STATE OF ALABAMA)
)
COUNTY OF MORGAN)

AFFIDAVIT OF RAY MELSON

Before me, the undersigned authority, this day personally appeared Ray Melson, who is known to me and who after being by me first duly sworn does depose and says as follows:

"My name is Ray Melson. I have previously provided an affidavit in a federal habeas proceeding relating to Thomas D. Arthur."

"About a month ago or so, I was contacted by Stephen J. Gustat. Mr. Gustat told me that he was an investigator for Tommy Arthur. I met with Mr. Gustat a couple of times. During one of the times that I met with Mr. Gustat, I signed the affidavit that I referred to above. The affidavit was prepared for me and provided to me by Mr. Gustat. On the day that I signed the affidavit, I was on some strong medication, pain and otherwise. The medication was for a nerve block. Because of the medication, I really do not remember much of what happened that day. I do remember telling Mr. Gustat about the medication. I reviewed today the affidavit that I provided previously. But, until today, I did not really remember what was in the affidavit, or if I even read it the day that I signed it."

"On September 20, 2002, an individual from the Alabama Attorney General's Office and the Colbert County District Attorney's Office came to my house. As it turns out, the gentleman from the Attorney General's Office was David Clark. The gentleman from the District Attorney's Office was Rocky Holden. I spoke to them voluntarily. I understood that I did not have to speak to them. At no point did I ever feel pressured or intimidated during my meeting with Mr. Clark and Mr. Holden."

"After reading the affidavit that I provided previously, I have decided to provide this affidavit in an effort to clarify some things. I am providing this affidavit voluntarily. I must also say that I am not on any medication today that would impair my

ability to understand what I am attesting to in this affidavit. Essentially, what I said in the previous affidavit about Tommy coming over on the day that we delivered the mobile home to Birmingham was true and correct. I must say, though, that Tommy came over that day some time between 7:30 or 10:00 that morning. I cannot say exactly what day it was that Tommy came over (the day we were going to deliver the mobile home to Birmingham). All I can say is that it was cold that day. I can't even say what month it was exactly. But, the information in paragraphs three and four of my previous affidavit is not correct. I do not believe that I said those things to Mr. Gustat. As I stated previously, on the day I signed that affidavit, I was on some strong medication and do not remember much of what happened that day."

"I remember hearing about Troy Wicker's murder. My memory is that the murder occurred in the beginning part of 1982. I do not remember when it was that I heard about Troy Wicker's murder. I know that in my previous affidavit that I said that I saw Tommy on the morning that Troy Wicker was murdered, but I cannot say that with any certainty now. I do not believe that that is what I told Mr. Gustat. I was on the medication the day I signed that affidavit, and so I really did not understand what was going on. Certainly, if I can say with any confidence that I was with Tommy on the morning that Troy Wicker was murdered, I would be the first to go to court and tell that to the judge. But, I cannot say that the morning I saw Tommy - the day we delivered the mobile home to Birmingham - was the same day that Troy Wicker was murdered. I just don't know if I saw Tommy the morning Troy Wicker was murdered. I really do not believe that I can say anything that would either hurt or help Tommy."

Further affiant sayeth not.

s/ Ray Melson

Ray Melson

STATE OF ALABAMA)
)
COUNTY OF MORGAN)

Sworn to before me on this the 20th day of September, 2002.

s/ Linda D. Crow
NOTARY PUBLIC

My commission expires: 12-20-2003

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

THOMAS D. ARTHUR,	)	
Petitioner,	)	
v.	)	
	)	
MICHAEL HALEY,	)	
Commissioner, Alabama Department of Corrections	)	Case NO. CV-01-N-983-S
Respondent.	)	

AFFIDAVIT OF STEPHEN J. GUSTAT

STATE OF FLORIDA)
) ss:
COUNTY OF HILLSBOROUGH)

STEPHEN J. GUSTAT, being first duly sworn to oath, deposes and says:

1. I am a licensed private investigator and have been retained to investigate potential mitigation and exculpation issues relevant to Mr. Thomas Arthur's case. I have worked as an investigator in similar matters for more than twenty years. I received a Master of Science degree in criminal justice administration from Troy State University in Alabama, which is where I also received my Bachelor of Science degree in criminal justice. In addition, I have received certifications from the International Association of Chiefs of Police, the Florida Institute for Law Enforcement, and the National Defender Investigator Association, as well as training in Florida Police Standards.

2. I am currently an adjunct professor in the Criminology Department at the University of Tampa in Florida, where I teach courses in criminal defense investigation, criminal procedure, and introduction to criminology and juvenile delinquency. I have written articles in various newsletters, including the National Defender Investigator Association Newsletter, the Capital Concerns Newsletter, and the Florida Public Defender Investigator Association Newsletter.

3. I was previously the chief investigator at the State of Florida's Capital Collateral Regional Counsel, Middle District, where I supervised eleven investigators and oversaw all investigations. Earlier, I worked as an investigator at the Volunteer Lawyers' Resource Center in Tallahassee, Florida and at the Tenth Judicial Circuit Public Defenders' Office in Bartow, Florida, where I was recognized as the "Investigator of the Year" by the Florida Public Defenders Association. Prior to working at the Public Defenders' Office, I was a police officer at the Sebring Police Department in Florida for five years. I served with the U.S. Army, including a tour of duty in Vietnam.

4. In my experience in law enforcement and capital investigations, I have interviewed more than one thousand individuals.

First Meeting with Ray Melson

5. On August 1, 2002, I interviewed Mr. Ray Melson for approximately an hour and a half at his home. His wife, Ann Melson, was also present. Mr. Melson mentioned that he was experiencing some back pain but would wait to take medication until after we were finished. At all times during the interview, Mr. Melson was alert and coherent and did not exhibit any signs of being under the influence of pain medication. In fact, although Mrs. Melson interrupted us on several occasions, Mr. Melson had no problem resuming our discussion and expressing himself clearly; I did not have to repeat any of my questions.

6. During the interview, I explained to Mr. Melson that I was investigating Thomas Arthur's case. I asked him to describe the last time he had seen Mr. Arthur. Mr. Melson told me that he had seen Mr. Arthur one morning in 1982 at Copper Mobile Homes on a day that he, Alphonso High and others were preparing to deliver a mobile home to Gardendale, a suburb of Birmingham. Mr. Melson told me that shortly after they had started their trip, Mr. High had joked that Mr. Arthur was trying to get himself hired. Mr. Melson also mentioned that while they were trying to set up the trailer, its wheels had gotten stuck in clay. I include these details to illustrate the sorts of facts, relayed by Mr. Melson, that suggested to me, as a trained and experienced investigator, that Mr. Melson's recollections were coherent, credible and inconsistent with his being on medication.

7. I asked Mr. Melson whether he could remember the time of Mr. Arthur's visit and he told me that it was between 8 a.m. and 9 a.m. Mr. Melson explained that he usually arrived to work at 7:30 a.m. and ate breakfast with the other workers. On the day of Mr. Arthur's visit, it was his turn to buy breakfast. Mr. Melson told me that he had bought breakfast for the group and went to Mr. High's office; they finished breakfast around 8:15 a.m. Mr. Melson also told me that Mr. Arthur arrived after everyone had finished their breakfast and that he stayed for about 20 to 30 minutes.

8. I asked Mr. Melson whether he could remember the date of Mr. Arthur's visit but he was unable to do so. However, Mr. Melson did recall that the day after Mr. Arthur's visit be had heard on the news that a man was murdered while sleeping and that the murder had occurred the day before. Mr. Melson also recalled that after he had learned about Mr. Arthur's arrest for Troy Wicker's murder, at that time he and Mr. High talked about Mr. Arthur. They discussed the fact that they had seen Mr. Arthur on the morning of the murder.

9. After Mr. Melson told me that he had seen Mr. Arthur between 8 a.m. and 9 a.m. on the morning of Troy Wicker's murder, he asked me how this information was helpful. I told

him that the murder had occurred around 9 a.m. Mr. Melson commented that Mr. Arthur could not be in two places at the same time. He explained that in 1982 the speed limit was 55 miles per hour, the roads had only two lanes, and that the trip between Decatur and Muscle Shoals probably would have take longer than an hour.

10. At the end of the interview, I asked Mr. Melson whether he was certain that he had seen Mr. Arthur on the morning of Troy Wicker's murder. Mr. Melson stated that he was sure in his recollections, mentioned that he would be willing to testify, and emphasized that everything he had told me was the truth. He added that he would not lie for anyone, a view adamantly supported by Mrs. Melson. Mr. Melson also mentioned that he would be willing to take a lie detector test. I asked Mr. Melson whether be would sign an affidavit and he agreed to do so.

Second Meeting with Ray Melson

11. On August 2, 2002, I met Mr. Melson for the purpose of showing him a draft of an affidavit that counsel had prepared based on the information he had given me on August 1st. During the hour and a half that I was with Mr. Melson, he was alert and coherent. He did not exhibit any signs of being under the influence of pain medication or any other drug, but instead complained of back pain.

12. We had originally decided to meet at Mr. Melson's home but he was not there when I stopped by at the agreed-upon time. Mr. Melson called me later and explained that he had gone to the hospital the previous night due to his back pain. We decided to meet at my hotel instead of his home. During our telephone conversation, I offered to give him directions but he did not need them; he asked whether my hotel was located across the street from Williams Travel Center and I told him that he was correct. Mr. Melson and Mrs. Melson arrived together early afternoon and we talked in my hotel room for about 30 to 40 minutes. They mentioned that they had just

come from a tanning salon. I teased Mr. Melson that he looked like a lobster, and he joked that the new bulbs at the salon caused him to burn a little.

13. I gave Mr. Melson a draft of his affidavit and asked him to review it carefully and make any corrections. He noticed that his last name was misspelled – "Nelson" instead of "Melson." He also explained that on the day of Mr. Arthur's visit, he was headed to Gardendale to set up a double-wide trailer and he asked why Gardendale was not mentioned in the affidavit. I asked him whether Gardendale was a suburb of Birmingham and he answered yes; I then pointed out that Birmingham was included in the affidavit. Mr. Melson also noted that the affidavit did not mention that the trailer had gotten stuck in clay. The details Mr. Melson relayed on August 2nd were in all respects identical to those he had described during our initial meeting.

14. After Mr. Melson reviewed the draft, counsel prepared a revised draft that incorporated the corrections requested by Mr. Melson and faxed that draft to my hotel. I pointed out the changes to Mr. Melson and asked him to review them carefully. As he read every page slowly, he nodded his head. Mr. Melson told me that all the information was accurate and that he was ready to sign it. I asked him to wait because he needed to sign the affidavit in the presence of a notary. Mr. Melson also mentioned that his back was hurting and that he would have to go home to take pain medication. I told him that I would try to finish as quickly as possible.

15. In separate cars, we left my hotel to look for a notary. We first went to Regions Bank in Priceville. Mr. Melson and I approached a bank teller and inquired about a notary. The teller asked me if I had an account and I responded no. The teller then asked Mr. Melson if he had an account and he said no but also pointed out that he cashes checks at this bank. The teller informed us that without an account we could not use the bank's notary service. We then went to the City Office of Priceville and found a notary. The notary asked Mr. Melson for identification, he pulled his driver's license from his wallet, and

then he executed his affidavit. While at the City Office, Mr. Melson mentioned that his back was hurting him and wanted to sit down.

Third Meeting with Ray Melson

16. Sometime between August 2 and August 14, 2002, I met with Mr. Melson at his home for about 30 minutes. I informed him that counsel wanted to meet with him to discuss the contents of his affidavit and asked him whether an August 15th meeting would be convenient. Mr. Melson indicated that such a meeting would be fine. He also gave me his telephone number and told me that his phone would be hooked up soon. Mr. Melson did not say anything during this brief meeting that suggested that he believed his affidavit to be inaccurate in any way.

Fourth Meeting with Ray Melson

17. On August 15, 2002, counsel and I met with Mr. Melson at his home for approximately 30 to 45 minutes. When we arrived, Mrs. Melson told us that he had just taken some medication and was resting. We asked whether we could speak to him briefly. Mrs. Melson announced our arrival and Mr. Melson got up and welcomed us into his home. In response to our question, he said he felt fine and did not mind meeting with us. Although he complained of back pain, Mr. Melson again appeared alert and coherent.

18. During the interview, counsel asked Mr. Melson about the contents of his affidavit and reviewed with him in detail what he had told me earlier. Mr. Melson reaffirmed the contents of his original affidavit. At no point did he tell us that he had been under any medication or other drug when he had signed the affidavit. Mr. Melson again mentioned that he would be willing to testify and added that he would need a subpoena to show his employer so that he could get off from work. Mr. Melson also emphasized that he was "just telling the truth" in his affidavit and again offered to take a lie detector test.

Meetings with Ray Melson After Submission of His Second Affidavit

19. When I received a copy of Mr. Melson's second affidavit submitted by the State, dated September 20, 2002, I decided that a further inquiry was warranted. On October 6, 2002, Mr. Arthur's counsel and I stopped by Mr. Melson's home and Mrs. Melson told us that he was in the shower and asked us to return later. When we did return, however, Mr. Melson refused to speak to us and ordered us off his property.

20. On October 7, 2002, we returned to Mr. Melson's home and requested a brief meeting. We stood on his porch and saw him through a clear screen-like door. He again refused to talk to us. I told him that we were just interested in the truth. He then called the police, who arrived shortly thereafter. When the police arrived, Mr. Melson came outside and ordered us off his property. As we were leaving, Mr. Melson waved what appeared to be a white business card and announced that he was answerable only to David Clark, who is an assistant Attorney General for the State of Alabama.

Meeting with Alphonso High

21. In May 2002, I met with Mr. Alphonso High at his home for about 30 minutes. During the interview, I informed Mr. High that I was investigating Thomas Arthur's case and asked him to describe the last time he had seen Mr. Arthur. Mr. High told me that he had seen Mr. Arthur around the time before Mr. Arthur was arrested for murder. I asked him about the circumstances and he told me that Mr. Arthur had stopped by his place of business around 9 a.m. on a day that he was heading to Birmingham to set up a trailer. I mentioned to Mr. High that he has a great memory, and he told me that with age his long-term memory has become better than his short-term memory. Mr. High added that Mr. Arthur drove his Ford

LTD on the day of his visit and there was nothing unusual about his behavior.

22. I asked Mr. High how close to the day of the murder for which Mr. Arthur was arrested did he see Mr. Arthur. Mr. High recalled hearing about that murder the day after Mr. Arthur had visited him. Mr. High told me that after he had learned about Mr. Arthur's arrest, he had made a connection and realized that he had seen Mr. Arthur on the morning of the murder. Mr. High was so certain that he pounded his fist on the kitchen table. *After* Mr. High unequivocally told me that he had seen Mr. Arthur that morning, I mentioned that Troy Wicker had been murdered on February 1, 1982. At no point did I supply Mr. High with any information that led him to recall Mr. Arthur's visit on the morning of the murder. Mr. High remembered that fact on his own without any reference to a date and he relayed the details of the visit to me.

23. Based on twenty years' experience as an investigator and my observations of Ray Melson and Alphonso High – including their demeanor and detailed recollections – I believed and continue to believe that the contents of their original affidavits were truthful. In my opinion, neither Mr. Melson nor Mr. High had a motive to lie in their original affidavits. Moreover, before signing their original affidavits, Mr. Melson and Mr. High had not spoken to each other about Mr. Arthur's visit on the morning of Troy Wicker's murder, and yet Mr. Melson was able to recount the very same facts included in Mr. High's initial affidavit.

Dated: October 28, 2002

s/ Stephen J. Gustat
Stephen J. Gustat

SWORN TO AND SUBSCRIBED before
me this 28 day of October, 2002.

Notary Public s/ Ebelynda Batiz
My Commission Expires: February 27, 2005

FILED
MAR 13 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(2)

No. 06-954

IN THE

SUPREME COURT OF THE UNITED STATES

THOMAS D. ARTHUR,

Petitioner,

v.

RICHARD F. ALLEN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TROY KING
Attorney General of Alabama

KEVIN C. NEWSOM
Solicitor General

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Counsel for Respondent

QUESTIONS PRESENTED

1. Should this Court grant certiorari to review whether the district court abused its discretion in denying Arthur an evidentiary hearing and discovery on his actual innocence claim?

2. Should this Court grant certiorari to review whether Arthur is entitled to statutory tolling under 28 U.S.C. § 2244(d)(1)(B) because of alleged inadequacies in the prison library and Alabama's failure to automatically appoint counsel before a post-conviction petition is filed?

3. Should this Court grant certiorari to review whether Arthur is entitled to equitable tolling despite his failure to argue the existence of extraordinary circumstances?

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The United States District Court for the Northern District of Alabama issued a memorandum opinion dismissing Arthur's petition as time-barred. (Pet. App. A1-A24) Arthur's motion to alter amend the judgment was denied by a separate memorandum opinion. (Pet. App. A25-A33) The United States Court of Appeals for the Eleventh Circuit affirmed. *Arthur v. Allen*, 452 F.3d 1234 (11th Cir. 2006). (Pet. App. A34-A61) The decision was modified slightly on petition for rehearing. *Arthur v. Allen*, 459 F.3d 1310 (11th Cir. 2006). (Pet. App. A62-A64)

STATEMENT OF JURISDICTION

This Court would have jurisdiction over this case pursuant to 28 U.S.C. § 1254(1). However, Arthur has failed to articulate adequate grounds for this Court to invoke its jurisdiction under Supreme Court Rule 10.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

Petitioner's statement of the statutory provision involved in this case, on page 2 of his petition, is correct. Arthur does not assert any constitutional basis for review.

STATEMENT OF THE CASE

Petitioner Thomas Douglas Arthur was found guilt by a jury and sentenced to death for the murder of Troy Wicker. Though his first two convictions were overturned, he was convicted and again sentenced to death at a third trial. The Alabama Supreme Court reversed his first conviction because details of Arthur's prior second-degree murder conviction were erroneously admitted at trial. *Ex parte Arthur*, 472 So.2d 665, 668-70 (Ala.1985). The Alabama Court of Criminal Appeals reversed his second conviction because of the admission of a statement Arthur made to a police officer approximately two weeks after he had asserted his right to remain silent. *Arthur v. State*, 575 So.2d 1165, 1171-75 (Ala. Crim. App. 1990).[1] His habeas petition relates to this third trial.

A. Facts from the Trial.

Judy Wicker ("Judy) and Theresa Rowland, Judy's sister, began to plan the murder of Troy Wicker in the early part of 1981. R. 748.[2] Theron McKinney, Rowland's husband, was also involved in some of the discussions. R. 800-802. They had at least two reasons for wanting Troy Wicker dead. First, there was an insurance policy worth $90,000 that was payable to Judy upon Troy Wicker's death. R. 748. Second, Rowland had previously hired Troy Wicker to burn her house down for insurance proceeds and he was threatening to expose that fact. R. 799-800.

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[1] The jury learned that Arthur told police that he did not know his accomplices or recognize their photographs. When confronted with contradictory evidence, Arthur ended the interview. *Arthur*, 575 So.2d at 1170-71.

[2] "R. __" refers to pages in the transcript of Arthur's 1991 capital murder trial.

Judy testified that she began a sexual relationship with Thomas Arthur after he committed to killing her husband and that she paid him $10,000 to carry out the murder. R. 753-54, 778-780.[3] Judy also paid Rowland $6000 and gave McKinney a Pontiac Trans Am and some jewelry. R. 780.

Patricia Green testified that Arthur approached her the day before the murder and asked her to get him some bullets. R. 560-562. Green sent a friend across the street to purchase .22 caliber mini magnum long rifle bullets, which Green later gave to Arthur. *Id.* Judy testified that Arthur shot Troy Wicker one time and ransacked the house. R. 768-70. An expert in firearm identification testified that the bullet removed from the victim's body was a .22 caliber long rifle consistent with a CCI brand bullet. R. 404-405. The four shell casings found near the body were CCI brand .22 long or long rifle casings. *Id.*

Judy and Arthur agreed that she would tell the police that a black person murdered her husband. R. 773-74. When Arthur murdered Troy Wicker on February 1, 1982, he darkened his face and wore a black wig in an apparent attempt to disguise himself as an African-American. R. 757-59. Joseph Wallace, an evidence technician with the Alabama Department of Forensic Sciences, removed a black wig from the car that Arthur used to make his getaway. R. 374. To deflect suspicion from Judy, Judy

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[3] Arthur was on work release when he committed the murder. Pat Halliday, an employee with the Decatur Work Release Center, testified that Arthur was transferred to the Morgan County Jail after the discovery of the discrepancy between the number of hours he was away from the center and the number of hours he was actually paid for working. Upon routine inspection of his effects before the transfer, twenty one-hundred-dollar bills were discovered in an envelope in Arthur's overcoat pocket. R. 543.

and Arthur agreed that she should be injured. R. 771-76. Arthur struck Judy with a blow that knocked out several of her teeth and lacerated her lip, injuries that resulted in her staying in the hospital for several days. *Id.*

Judy testified that on the day of the murder Arthur was carrying a gun and a garbage bag. R. 760. Debra Phillips testified that Arthur was supposed to meet her for lunch on the day of the murder, but he was late and, instead of going to lunch, they rode to a bridge over the Tennessee River where Arthur stopped the car and threw a garbage bag, that was half-full and bulky and wrapped in a sheet, into the river. R. 627-34. As he disposed of the garbage bag, Arthur said he was "trying to get rid of some old memories." R. 632.

In accordance with their agreement, Judy testified falsely at her own trial where she was convicted of murder. *Wicker v. State,* 433 So. 2d 1190, 1195-96 (Ala. Crim. App. 1983). She gave her first truthful testimony regarding Troy Wicker's murder at Arthur's second trial. *Arthur v. State,* 575 So. 2d 1165, 1167 (Ala. Crim. App. 1990). She admitted in her testimony that the prosecutor told her that, if she testified truthfully, he would put in a "good word ... for her with the parole board." *Id.*

Arthur was his own lead counsel at his trial, but Harold Walden and Joseph Walden served as co-counsel.[4] William Del Grosso served as stand-by counsel. R1-22. Arthur conducted the majority of voir dire questioning, examination of witnesses, argument to the jury, and argument to the court. In fact, Arthur cross-examined each of the prosecution's 13 witnesses, often at length. *See, e.g.,* R. 375-85. Arthur presented four witnesses in his defense. Bruce Coan, a police detective, testified about his observations of the crime scene. R. 867. Two of

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[4] The Waldens are father and son, respectively.

Arthur's four witnesses were called in an apparent attempt to offer an explanation of how, as a prisoner, he came to possess $2100. Bruce Carroll, a friend and fellow inmate, testified that he lost $6500 to Arthur in a poker game. R. 879-83. Gene Moon, who resided in the Cullman County Jail at the time of his testimony, said that another inmate gave him an envelope with $2000 in it and that Moon put it in Arthur's coat. R. 927-29. The fourth and final witness, Ronald Spears, an inmate at West Jefferson prison, stated that Patricia Green told him that the police were forcing her to lie about Arthur asking her to buy some bullets for him. R. 901-07.

The record also reveals that Arthur was searching for witnesses to provide him with an alibi. During cross-examination of Joel Reagan, Arthur asked: "...[D]o you remember Larry Whitman telling you that he saw me the morning that Mr. Wicker was murdered over in Muscle Shoals?" R. 473-74. There are no references in the trial record to either Alphonso High or Ray Melson, the two individuals (of which more later) who signed affidavits filed in the federal district court stating they talked to Arthur around the same time Troy Wicker was being murdered, having seen Arthur on the day of the murder.

At the penalty phase, Walden argued that the jury should recommend a sentence of life without parole because of several mitigating factors. First, Walden argued that Arthur had been a model prisoner and had spoken to high school groups as a part of correctional programs to deter young people from committing crimes. R. 1170. Walden also argued that Arthur's punishment was disproportionate in relation to the other persons that had involvement in Troy Wicker's murder. He told the jury that Judy, who was just as culpable as Arthur, was soon to be released from prison, and that Rowland and McKinney had never been prosecuted for their roles. R. 1171-72.

Arthur argued to the jury that he should be sentenced to death. Arthur said that Walden was morally opposed to the death penalty and urged the jury to disregard his counsel's arguments. R. 1178. Arthur told the jury that he didn't have a death wish; in fact, he said "I wouldn't dare ask you for it if I thought for a minute that I would be executed." R. 1181. Arthur argued that a death sentence would allow him to have more visitations from his children, R. 1183, and to have more privacy in his death row cell as opposed to living in general population, R. 1190, and would allow him to have more control over his appeals. R. 1186-1194. Arthur told the jury that he had already managed to overturn his capital murder conviction on two previous occasions and that, if the jury sentenced him to death, he would be in a better position to overturn his latest capital murder conviction. R. 1188-89.

B. Proceedings at Trial and Direct Appeal.

Upon consideration of the facts discussed above, the jury found Arthur guilty for the 1982 capital murder of Troy Wicker on December 5, 1991. C. 11, R. 1150. The murder was made capital because Arthur had previously been convicted of murder in the second degree in 1977. *Arthur v. State*, 711 So. 2d 1031, 1043 (Ala. Crim. App. 1996) (citing Ala. Code § 13A-5-40(a)(13)).

Following the sentencing hearing described above, the jury recommended, by an eleven-to-one vote, that Arthur be sentenced to death. C. 12, R. 1237. On January 24, 1992, the trial court entered a sentencing order in which it followed the jury's recommendation and sentenced Arthur to death. C. 14-26, R. 1291-1300.

On March 8, 1996, the Alabama Court of Criminal Appeals affirmed Arthur's conviction and death sentence. *Arthur v. State*, 711 So. 2d 1031 (Ala. Crim. App. 1996). On November 21, 1997, the Supreme Court of Alabama

affirmed the judgment of the Court of Criminal Appeals. *Ex parte Arthur*, 711 So. 2d 1097 (Ala. 1997). Arthur did not file a petition for certiorari in this Court.

C. Postconviction Proceedings.

Arthur failed to meet his obligations under the state and federal statutes of limitation for postconviction challenges. Arthur had until April 7, 2000 — two years the after the Alabama Court of Criminal Appeals issued the certificate of judgment on direct appeal—to file his Rule 32 petition in state court. *See* Rule 32.2(c), Ala.R.Crim.P. His time to file a habeas corpus petition in federal court under 28 U.S.C. § 2254 expired on June 18, 1999. *See* 28 U.S.C. § 2244(a)(1). Both limitation periods passed without any filings by Arthur. As a result, the State filed a motion to set an execution date with the Alabama Supreme Court on September 8, 2000.

On January 25, 2001, Arthur, proceeding through counsel, filed a Rule 32 petition in the Jefferson County Circuit Court. Arthur's petition was filed more than nine months after the limitation period had expired, and more than nineteen months too late for any tolling of his habeas limitation period. The Rule 32 Petition was dismissed as untimely. C32. 60-187.[5] The Alabama Court of Criminal Appeals affirmed the denial and dismissal of Arthur's Rule 32 petition. *Arthur v. State*, 820 So. 2d 886, 889 (Ala. Crim. App. 2001). The Alabama Court of Criminal Appeals denied Arthur's application for rehearing and the Alabama Supreme Court denied certiorari review. *Id.* This Court denied Arthur's petition for writ of certiorari. *Arthur v. Alabama*, 535 U.S. 1053 (2002).

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[5] "C32. __" refers to pages of the clerk's record from Arthur's Rule 32 state post-conviction proceedings.

Pursuant to the State's motion, the Alabama Supreme Court set Arthur's execution date for April 27, 2001. On April 20, 2001, Arthur filed a petition for writ of habeas corpus, along with a motion to stay the execution, in the United States District Court for the Northern District of Alabama. The district court stayed the execution and stayed this habeas proceeding pending a resolution of Arthur's state post-conviction petition in the state appellate courts. R1-11.

Arthur attempted to overcome his failure to comply with the statute of limitation in federal court by asserting a "gateway claim" of actual innocence. His claim was based principally on the affidavits of Alphonso High and Ray Melson,[6] who claimed to have seen Arthur on the February 1, 1982, the morning of the murder. High and Melson gave affidavits to the State that contradicted their earlier affidavits, stating that they could not be certain of the day or month that they saw Arthur.

The federal district court rejected Arthur's actual innocence claim and dismissed Arthur's habeas petition as untimely. R1-55, R1-56. Arthur's motion for reconsideration was denied. R1-61, R1-62. Arthur's motion for a certificate of appealability was granted by the district court. R1-66. The Eleventh Circuit Court of Appeals affirmed the dismissal. *Arthur v. Allen*, 452 F.3d 1234 (11th Cir. 2006). The decision was modified slightly on petition for rehearing, with the court elucidating its denial of a hearing and discovery. *Arthur v. Allen*, 459 F.3d 1310 (11th Cir. 2006).

Arthur's petition to this Court followed.

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[6] Arthur also submitted an affidavit from Billy Peebles to the district court, but Peebles is not discussed in Arthur's Eleventh Circuit briefing or in his petition to this Court. *Arthur*, 452 F.3d at 1244 n.8.

REASONS FOR DENYING THE PETITION

I. THIS COURT SHOULD DENY CERTIORARI REVIEW OF ARTHUR'S CLAIM THAT HE WAS ENTITLED TO AN EVIDENTIARY HEARING AND DISCOVERY ON HIS ACTUAL INNOCENCE CLAIM.

Arthur first argues that the Eleventh Circuit errred in failing to grant an evidentiary hearing and discovery on his actual innocence claim. Arthur contends that this Court should grant certiorari to determine whether he was entitled to an discover and an evidentiary hearing to establish his actual innocence claim. (Pet. 8-15) Certiorari should be denied for the following reasons.

A. This Court Should Deny Certiorari Because There Is No Conflict Between This Case And This Court's Prior Decisions.

Arthur's claim is not worthy of certiorari review because he fails to demonstrate an actual conflict between the circuit court decision and a decision of this Court. Arthur suggests that the lower court's decision is contrary to *Schlup v. Delo*, 513 U.S. 298 (1995) and instead erroneously applies the standard set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). The circuit court's decision is consistent with *Schlup* and its progeny.

Arthur first suggests that, given the uncertain credibility of affiants High and Melson, the circuit court should have remanded for an evidentiary hearing. (Pet. 12) For support, he quotes from *Battle v. Delo*, 64 F.3d 347 (8th Cir. 1995), which states that "[i]f new evidence calls the credibility of certain witnesses into question, and their credibility figures reasonably in our assessment, remand for an evidentiary hearing *may* be appropriate." *Id.* at 352 (emphasis added). The court immediately added that "the mere fact that affidavits are presented

does not automatically require such a remand." *Id.* Indeed, the Battle court denied the petitioner's gateway innocence claim without remanding for a hearing on his affidavits and without granting him discovery or a hearing to attack the State's serology evidence. *Id.* at 353-55. The lower court's decision is consistent with the precedent cited by Arthur.

Arthur next argues that the circuit court improperly applied the "sufficiency of the evidence" standard from *Jackson* rather that *Schlup*'s "more likely than not" standard. (Pet. 12-13) Arthur relies on the lower court's holding that "the affidavits do not furnish good cause to believe that the facts, if 'fully developed' through the discovery sought, would be any different from those found at trial." *Arthur*, 459 F.3d at 1310. However, the opinion never discussed or applied the "sufficiency of the evidence" standard and never cited *Jackson*. It is apparent from the opinion that the court properly applied the *Schlup* standard in conjunction with the "good cause" standard for discovery in habeas corpus proceedings. *See Arthur*, 459 F.3d at 1310-11 (citing *Schlup* and *Bracy v. Gramley*, 520 U.S. 899 (1997)). Arthur's contention that the court applied the *Jackson* standard is completely baseless.

The demands on this Court's time mandate that it select for review only those truly important cases with wide ranging impact. This is not such a case. Certiorari is not a matter of right, but of sound judicial discretion granted only when special and important reasons exist. *See Fay v. Noia*, 372 U.S. 391, 436 (1963). "A petition for a writ of certiorari will be granted only for compelling reasons." Rule 10, Rules of the Supreme Court of the United States. The "conflicts" asserted by Arthur are based upon misrepresentations of the lower court's opinion, and a decision on his claim will only serve to

reaffirm the current state of the law. This Court should, therefore, deny certiorari.

B. <u>This Court Should Deny Certiorari Because This Claim Is Without Merit and Is Not Appropriate for Review By This Court</u>.

This claim is also without merit. In reviewing this claim the circuit court correctly held that Arthur was not entitled to discovery or a hearing. Arthur's petition merely repeats the arguments he proffered in the lower courts, and does nothing to undermine those decisions.

Arthur was not entitled to a hearing to determine the credibility of his two "alibi witnesses." Under *Schlup*, the evidence used to support a claim of actual innocence must be "new reliable evidence that was not presented at trial." 513 U.S. at 299, 327-328. Even taking the original affidavits of High and Melson at face value without accounting for their subsequent, express recantation, the fact that neither Arthur, nor High and Melson, came forward with this information during any of Arthur's three capital murder trials or until Arthur was within 48 hours of his execution renders their affidavits highly unreliable.[7] A hearing is not required to make that

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[7] Assuming the information in the initial affidavits from High and Melson is correct, Arthur himself had knowledge for over 20 years that he did not murder Troy Wicker and that he knew two people who could testify regarding his location when the murder was taking place. At his third trial, Arthur served as lead counsel, participating in every phase of the trial, including cross-examining every one of the prosecution's 13 witnesses, often at length. It stands to reason that if Arthur had knowledge that he was in another location at the time the murder was taking place, and that two people were ready, willing, and able to testify to those facts, he would have presented that information at his trial. However, Arthur never mentioned High and Melson during any of his three trials,

determination, and the lower courts properly denied Arthur's request for one. *See Arthur v. Allen*, 452 F.3d 1234, 1246 (11th Cir. 2006) (stating that "exculpatory affidavits 'produced . . . at the 11th hour with no reasonable explanation for the nearly decade-long delay' are "suspect") (quoting *Herrera v. Collins*, 506 U.S. 390, 423 (1993) (O'Connor, J., concurring)).

The circuit court found that the affidavits "in no way undermine[] confidence in the result of his trial." *Id.* Significant evidence demonstrates Arthur's guilt. Judy Wicker testified in detail about Arthur's commission of the murder, and the affidavits tend to contradict her testimony. However, as discussed above, her testimony was supported by significant evidence, including testimony from multiple witnesses that Arthur had a relationship with Judy, had acquired ammunition the day before the murder, and that Judy's purse and a wig matching that used in the crime were found in his car. A showing of actual innocence requires it be "more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Schlup*, 513 U.S. at 327. Even if High and Melson were unwavering in their recollection of the morning February 1, 1982, their testimony can not overcome this burden.

Arthur's request for discovery is also meritless. Arthur's discovery requests do not relate to the above-discussed affidavits, but instead seek physical evidence that he asserts may exonerate him. "[A] habeas petitioner is not entitled to discovery as a matter of course." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). Good cause is shown only when the federal habeas petitioner identifies "specific allegations before the court

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during any of his appeals, or during the time while the limitation periods for both his state and federal post-conviction petitions expired.

[which] show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is ... entitled to relief." *Id.* at 908-909. Arthur has never plead specific allegations demonstrating how any of the evidence would show that he is actually innocent of killing Troy Wicker. Thus he has not shown good cause for the discovery he seeks. Arthur also fails to point to any case where a petitioner was granted discovery under similar circumstances. For the foregoing reasons, this Court should deny certiorari.

II. THIS COURT SHOULD NOT GRANT CERTIORARI TO ARTHUR'S CLAIM THAT HE IS ENTITLED TO STATUTORY TOLLING.

Arthur requests that this Court consider whether the limitation period should have been statutorily tolled because he alleges that the library facilities at Holman Prison are inadequate and the State did not provide him legal assistance. (Pet. 15-21)

A. The Claim that Arthur Was Denied Access to a Law Library is Meritless and Irrelevant to His Failure to Comply with the Limitation.

In his petition before this Court, Arthur attempts to justify certiorari review by noting that other circuits have suggested that a "book paging" system is constitutionally inadequate. (Pet. 18-19 (citing cases)) This argument is inadequate to support review for several reasons.

As a preliminary matter, Arthur never presented this argument to the courts below. Before the district court, Arthur challenged only the adequacy of the death row reading room, and made no allegations regarding the adequacy of or his access to the main prison library. *Arthur v. Haley*, CV-01-N-0983-S, at *8 n.7 (N.D. Ala. Jun. 5, 2003) (slip op.) (Pet. App. A32). In any event, Arthur **fails to cite a single case** in this section of his

petition that addresses equitable or statutory tolling. Given Arthur's failure to assert compelling reasons for review under Rule 10, certiorari is inappropriate.

The claim is also without merit. Arthur has never demonstrated that the law library actually served as an impediment to his filing. In *Helton v. Secretary for the Department. of Corrections*, 259 F.3d 1310 (11th Cir.2001), the Eleventh Circuit denied tolling for an allegedly inadequate prison library because the petitioner had not exercised reasonable diligence. The petitioner never asserted that he "asked for the amendments to the federal habeas corpus statutes," *id.* at 1314, could not show he was "even aware the library did not have these materials at the time he filed his section 2254 petition," *id.* at 1313; and failed "to state any independent efforts he made to determine whether the relevant limitations period began to run," *id.* at 1314. This requirement is consistent with the approach taken by other circuits in addressing prison library tolling claims. *See, e.g., Miller v. Marr*, 141 F.3d 976, 978 (10th Cir.1998) ("In the final analysis, however, Mr. Miller has provided no specificity regarding the alleged lack of access and the steps he took to diligently pursue his federal claims."); *Roy v. Lampert*, 465 F.3d 964 (9th Cir. 2006) (distinguishing Helton and Roy because the petitioner had diligently pursued his claims and had attempted to attain a copy of AEDPA but had been prevented from doing so by the library).

Not only did Arthur fail to show that the library prevented his timely filing, but the circuit court found that he was "aware of the deadline to file his habeas petition[.]" *Arthur*, 452 F.3d at 1253. Despite this, he was not diligent in attempting to file a timely habeas petition. *Id.* The circuit court's decision is correct, and this Court should deny certiorari.

B. <u>The Claim that the State Failed to Provide Arthur with Legal Assistance or Counsel Fails to Assert a Reason for this Court to Grant Review</u>.

Arthur next asserts that he was prevented from filing his petition because he was not provided counsel to prepare a Rule 32 petition. (Pet. 19-21) Arthur fails to assert any reason why this court should grant review to this claim.

Arthur provides absolutely no argument that this claim is worthy of the Court's review. This Court has held that a prisoner has no right to an appointed counsel during post-conviction proceedings. *See Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987) ("We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions and we decline to so hold today."); *Murray v. Giarratano*, 492 U.S. 1, 12 (1989) (plurality opinion) ("[]*Finley* applies to those inmates under sentence of death as well as to other inmates[.]"); *Smith v. Robbins*, 528 U.S. 259, 275 (2000) (holding death row inmate has no constitutional right to counsel in post-conviction proceedings). As such, it is undisputable that Arthur cannot show "State action in violation of the Constitution or laws of the United States," as is required for statutory tolling under AEDPA. 28 U.S.C. § 2244(d)(1).

In any event, if Arthur wanted legal representation to pursue either state or federal post-conviction relief, all he had to do was request counsel. The *Alabama Rules of Criminal Procedure* provide that a court, upon request from an indigent inmate, may appoint counsel.[8] Rule 32.7(c), A.R.Cr.P. Instead of requesting counsel, Arthur

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[8] In order to obtain appointed counsel, the post-conviction petitioner need only fill in the form Rule 32 petition, located at the end of Rule 32 in the Alabama Rules of Criminal Procedure.

allowed the statute of limitation for filing a state post-conviction claim to expire while (allegedly) looking for counsel of his choice on the internet. Notably, Arthur has not cited a single case in the State of Alabama where an indigent death row inmate was not appointed counsel in a state post-conviction proceeding following a request. Furthermore, Arthur has not demonstrated how his failure to obtain state-funded counsel prevented him from pursuing post-conviction relief.

Similarly, no "illegal state action" prevented Arthur from filing a federal habeas petition. The United States Code provides that an indigent inmate seeking federal habeas relief "shall be entitled to the appointment of one or more attorneys ...." 21 U.S.C. § 848(q)(4)(B). In order to invoke this right to habeas counsel, an inmate need only file a motion with the federal court requesting counsel. *See McFarland v. Scott*, 512 U.S. 849 (1994). Arthur was not provided an attorney to represent him in pursuing federal habeas relief because he did not ask for one. Instead, Arthur allowed the statute of limitation to expire while he allegedly searched for a lawyer on his own. Inmates simply are not entitled to counsel of their choice. Furthermore, as this Court is well aware, *pro se* petitioners routinely file habeas petitions, so even if Arthur was unable to select counsel of his own choosing, it was still possible for him to file a federal habeas petition. There is no basis for statutory tolling in this case.

III. THIS COURT SHOULD NOT GRANT CERTIORARI TO ARTHUR'S CLAIM THAT HE IS ENTITLED TO EQUITABLE TOLLING.

Arthur also asserts that he was entitled to equitable tolling of the limitations period because he faces the death penalty. (Pet. 21-27). Though Arthur does identify a possible split among the circuits in the equitable tolling standards applicable to capital cases, review is

inappropriate here because Arthur cannot satisfy any equitable tolling standard.

A. The Majority Rule—Which Requires Extraordinary Circumstances for Equitable Tolling in Both Capital and Non-Capital cases—Was Correctly Applied Here and is Consistent With This Court's Precedent.

The Eleventh Circuit has held that the limitation period in 28 U.S.C. § 2244 may be equitably tolled "if the petitioner demonstrates (1) diligence in his efforts to timely file a habeas petition and (2) extraordinary and unavoidable circumstances." *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir.2000) (citing *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999)). Equitable tolling is "applied sparingly" and mere negligence or mistake by an attorney, for example, is insufficient to invoke its protections. *Id.* "The focus of the inquiry regarding 'extraordinary circumstances' is on the circumstances surrounding the late filing of the habeas petition and not on the circumstances of the underlying conviction, and whether the conduct of others prevented the petitioner from timely filing[.]" *Arthur*, 452 F.3d at 1253 (citations and quotation marks omitted). The Eleventh Circuit found that Arthur failed to demonstrate extraordinary circumstances or diligence. *Id.*

In his petition, Arthur abandons any argument that extraordinary circumstances were present, but instead argues that a lesser standard should apply in capital cases. (Pet. 22-25) Only the Third Circuit has held that in death penalty cases, "less than 'extraordinary' circumstances" may trigger equitable tolling of the AEDPA's statute of limitations. *Fahy v. Horn*, 240 F.3d 239, 244-45 (3d Cir. 2001). The court essentially held that because "death is different," a petitioner facing the death penalty can be granted tolling by showing only that

he "diligently and reasonably asserted his claims" and "rigid application of the statute would be unfair." *Id.* at 245. The other circuits to address this question have expressly rejected the proposition that capital proceedings are not subject to the "extraordinary circumstances" requirement. *Steed*, 219 F.3d at 1300; *Rouse v. Lee*, 339 F.3d 238, 251 (4th Cir.2003) (en banc) (denying equitable tolling for a petition that was filed one day late); *Johnson v. McBride*, 381 F.3d 587 (7th Cir. 2004) (same).[9]

Arthur urges that a different standard is needed in capital cases because a petitioner may be executed even though—as he contends is the case here—the petition contains meritorious claims and those "claims have never been reviewed on the merits by a state or federal post-conviction court." (Pet. 24-25) However, the merits of the underlying claims should not influence an equitable tolling decision. The Fourth Circuit reasoned as follows:

> Allowing consideration of the merits of time-barred claims to creep into the equitable tolling analysis lets petitioners effectively circumvent the statute of limitations because the merits of their claims will always be considered. This would enable petitioners who were in no way prevented from complying with the statute of limitations to create delay and undermine finality—two of the reasons that precipitated enactment of the AEDPA statute of limitations. . . . [W]e reject [the

[9] Though Arthur contends that *Modrowski v. Mote*, 322 F.3d 965, 968 (7th Cir. 2003), acknowledges that an exception to the equitable tolling rules for capital cases may exist (Pet. 22), *Modrowski* was not a capital case so the issue remained unsettled. The circuit's subsequent decision in *Johnson* is an unmitigated rejection of any capital-case exception.

> petitioner's] invitation to apply equitable tolling based on a factor that had nothing to do with his failure to file on time.

Rouse, 339 F.3d at 251; see *Johnson*, 381 F.3d at 591 ("It is unnecessary to add to the discussion of this subject in *Rouse*, 339 F.3d at 251-56.").

This Court has also demonstrated a general reluctance to create dual standards for post-conviction proceedings in capital and noncapital cases. In *Ohio Adult Parole Authority v. Woodard*, this Court emphasized that

> [t]he distinctions accorded a life interest . . . are primarily relevant to trial. **And this Court has generally rejected attempts to expand any distinctions further.** *See, e.g., Murray v. Giarratano*, 492 U.S. 1, 8-9[] (1989) (opinion of Rehnquist, C.J.) (there is no constitutional right to counsel in collateral proceedings for death row inmates; cases recognizing special constraints on capital proceedings have dealt with the trial stage); *Satterwhite v. Texas*, 486 U.S. 249, 256[] (1988) (applying traditional standard of appellate review to a Sixth Amendment claim in a capital case); *Smith v. Murray*, 477 U.S. 527, 538[] (1986) (applying same standard of review on federal habeas in capital and noncapital cases); *Ford* [*v. Wainwright*, 477 U.S. 399, 425] (Powell, J., concurring) (noting that the **Court's decisions imposing heightened requirements on capital trials and sentencing proceedings do not apply in the postconviction context**).

523 U.S. 272, 281-82 (1998) (emphasis added).

This Court's decision in *Coleman v. Thompson*, 501 U.S. 722 (1991), is instructive. In *Coleman*, the petitioner filed his notice of appeal three days late in state post-conviction proceedings. This Court held that his habeas corpus claims were defaulted because "[t]here is no constitutional right to an attorney in state post-conviction proceedings." *Id.* at 252-54. This Court noted that there is not a more lenient standard for capital cases. *Id.* at 252 (citing *Murray v. Giarratano*, 492 U.S. 1, 109 (1989). As the Seventh Circuit reasoned, "[t]o the extent *Fahy*[] suggests that attorneys' errors in handling collateral attacks against death sentences justify equitable tolling even though the identical conduct in other cases would not, it is hard to reconcile with *Coleman*, which the third circuit did not mention." *Johnson*, 381 F.3d at 590-91. The Third Circuit's decision in *Fahy* is an outlier, further review of Arthur's claim is therefore inappropriate.

B. <u>Even if this Court Desires to Resolve the Conflict Between the Equitable Tolling Standards Set Forth in *Fahy* and the Other Cases Cited, Review of Arthur's Claim is Inappropriate Because He Cannot Meet Either Standard</u>.

Arthur's petition is a poor vehicle for reconciling the any conflict among the circuit courts because he cannot meet the requirements of even the lower standard established in *Fahy*. There is therefore a significant probability that the circuit split would remain unresolved even if this Court reviews this claim.

The circumstances faced by the petitioner in *Fahy* were quite unusual—even if they did not rise to the level of "extraordinary circumstances." The court found that petitioner Fahy "believed he was required to pursue a fourth petition for collateral relief in state court" and

"reasonably believed that the state petition was properly filed." *Fahy*, 240 F.3d at 244. However, the Pennsylvania Supreme Court eventually determined that his fourth petition was inappropriate and thus improperly filed, precluding statutory tolling for his subsequent habeas corpus petition and causing it to be untimely. *Id.* In applying equitable tolling, the Third Circuit found that Fahy's mistake was reasonable because "[t]he law at the time of Fahy's petition was inhibitively opaque" such that even the Third Circuit "could not predict how the Pennsylvania court would rule[.]" *Id.* at 245. This confusion in the law was central to the court's reasoning. *Compare Phillips v. Vaughn*, 55 Fed. Appx. 100, 101 (3d Cir. 2003) (not precedential) ("[U]nlike in *Fahy*, the state law regarding timeliness that is at issue here was *well-settled and unquestioned.*") (emphasis added).

The circumstances faced by Arthur are entirely typical of those confronted and surmounted by the vast majority of capital murder petitioners throughout Alabama and the nation. Both the Rule 32 (Alabama state post-conviction rule) and AEDPA limitation periods are well-settled and unambiguous, a fact that Arthur does not dispute.[10] Also, unlike in *Fahy*, Arthur has not filed anything in any court that he could have believed (reasonably or otherwise) complied with or tolled either limitation period. Whether Arthur is compelled to show

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[10] The *Fahy* court concluded its opinion by narrowly tailoring its applicability, stating that "[w]hen state law is unclear regarding the operation of a procedural filing requirement, the petitioner files in state court because of his or her reasonable belief that a § 2254 petition would be dismissed as unexhausted, and the state petition is ultimately denied on these grounds, then it would be unfair not to toll the statute of limitations during the pendency of that state petition up to the highest reviewing state court." 240 F.3d at 245. Arthur ignores this carefully couched language.

extraordinary circumstances as required by the majority rule, or the "confounding and unsettled" but "less than 'extraordinary' " conditions required by the Third Circuit rule, *Fahy*, 240 F.3d at 245, Arthur has failed to meet is burden.

In any event, Arthur must also show that he diligently asserted his claims, a burden he also cannot meet. *See id.* at 245; *Covey v. Arkansas River Co.*, 865 F.2d 660, 662 (5th Cir. 1989) ("[E]quity is not intended for those who sleep on their rights."); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998) (The petitioner "has provided no specificity regarding ...the steps he took to diligently pursue his federal claims....").

There is no evidence to suggest that Arthur ever attempted, with any diligence, to pursue his remedies in federal court. In fact, he waited more than 22 months after the federal statute of limitations expired before seeking relief. Arthur attempts to show diligence by citing his attempt to obtain private counsel. (Pet. 25) Seeking to obtain a lawyer does not demonstrate diligence in pursuing federal habeas relief. Indeed, Arthur could have filed his federal habeas petition *pro se* or requested the federal district court to appoint him a lawyer. The first time Arthur even *attempted* to pursue federal habeas relief was after AEDPA's statute of limitation had long expired and his execution date was set. Though Arthur claims he was ignorant of the limitation periods, the circuit court explicitly held that

> Arthur was aware of time limits for filing his petition and the consequences for missing those times. In an internet posting seeking counsel, Arthur asked for "help . . . **now I'm running out of time for appeals.**" R2-40, Exh. E (also stating "the

> time for appeal on my case is critical to me.")

Arthur, 452 F.3d at 1251 (emphasis added). He blames his failure in part on the inadequacy of the prison library, but provides no evidence that he ever attempted, successfully or unsuccessfully, to use its resources. His contention that he did not know that Alabama would provide him appointed counsel for a Rule 32 petition is also belied by his own statements. In letters requesting assistance, he specifically dismissed the idea of accepting state-appointed counsel because "'Alabama's court-appointed attorneys don't get paid enough to care.'" *Arthur*, 452 F.3d at 1250.[11] Though it is understandable that Arthur wanted to hold out for his ideal representation, his stubbornness in refusing to accept other assistance or to act pro se in the face of deadlines he knew were approaching cannot be called diligence.

The Fifth Circuit, in *Cantu-tzin v. Johnson*, 162 F. 3d 295, 300 (5th Cir. 1998), another capital case, stated that the petitioner's conduct in waiting until the statute of limitations expired and the execution date was set, and then seeking habeas relief "contradicts any possibility that equitable circumstances exist which might authorize a tolling of the AEDPA limitation period." Because equitable tolling is not warranted unless the federal habeas petitioner can demonstrate his diligence in attempting to file a timely federal habeas petition and because Arthur has not shown the required diligence,

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[11] Arthur's discriminating taste in attorneys dates back to his trial, where he chose to act as his own attorney rather than allow his three appointed attorneys to lead his defense. *Arthur*, 452 F.3d at 1241. For his appeals, he similarly declined to accept assistance from the Southern Center for Human Rights in Atlanta, Georgia, or to the Equal Justice Initiative of Alabama, in Montgomery, Alabama. *Id.* at 1250.

there is no possibility that Arthur will receive equitable tolling regardless of the standard applied. Therefore, there is no reason for this Court to grant certiorari review.

CONCLUSION

For the foregoing reasons, this Court should deny Arthur's petition for certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

THOMAS D. ARTHUR,

Petitioner,

—v.—

RICHARD F. ALLEN,
Commissioner, Alabama Department of Corrections,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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In denying Mr. Arthur's requests for a hearing and discovery to establish a gateway claim of actual innocence, the Eleventh Circuit failed to apply the governing standards set forth in *Schlup* v. *Delo*, 513 U.S. 298 (1995), and *Bracy* v. *Gramley*, 520 U.S. 899 (1997). The appellate court also erred in failing to apply statutory or equitable tolling to Mr. Arthur's otherwise time-barred constitutional claims. Although the State of Alabama argues that Mr. Arthur's case is not a "truly important case[] with wide ranging impact" (Opp. at 10), this Court has recognized that the "writ of habeas corpus plays a vital role in protecting constitutional rights," *Slack* v. *McDaniel*, 529 U.S. 473, 483 (2000), and that the "[d]ismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely." *Lonchar* v. *Thomas*, 517 U.S. 314, 324 (1996). If the Eleventh Circuit's erroneous decision is allowed to stand, Mr. Arthur will likely be executed—for a crime that he did not commit—without *any* state or federal collateral review of his trial and death sentence.

I. The Eleventh Circuit Erred in Failing to Grant Mr. Arthur's Requests for a Hearing and Discovery.

A. Under *Schlup*, Mr. Arthur Is Entitled to a Hearing.

The State of Alabama argues that Mr. Arthur is not entitled to a hearing because "[s]ignificant evidence demonstrates [his] guilt." (Opp. at 12) Although it concedes that the affidavits of Alphonso High and Ray Melson "tend to contradict" the testimony of Judy Wicker, the State insists that "her testimony was supported by significant evidence." (*Id.*) In light of such evidence, the State argues that even if Mr. Arthur's alibi witnesses "were unwavering in their recollection," their testimonies cannot satisfy *Schlup*'s "more

likely than not" standard. (*Id.*) The State's argument lacks support in both the factual record and the law.

As detailed in Mr. Arthur's Petition, Judy Wicker's testimony was the only direct evidence that tied Mr. Arthur to the murder of Troy Wicker. At the time she testified against Mr. Arthur, Judy Wicker was serving a life sentence for the same crime. Although she had previously testified at her own trial that Mr. Arthur was not involved in the murder of her husband, *Wicker* v. *Alabama*, 433 So. 2d 1190, 1192-94 (Ala. Crim. App. 1983), she changed her story, implicated Mr. Arthur, and obtained early parole. None of the physical evidence collected at the crime scene or in Judy Wicker's car linked Mr. Arthur to the murder. The State of Alabama nevertheless insists that Judy Wicker's testimony was supported by "significant evidence," including "testimony from multiple witnesses that Arthur had a relationship with Judy, had acquired ammunition the day before the murder, and that Judy's purse and a wig matching that used in the crime were found in his car." (Opp. at 12) Such "significant evidence," however, cannot bolster the testimony of a convicted murderer and admitted perjurer.

First, whether Mr. Arthur had a relationship with Judy Wicker does not bear on whether he murdered Troy Wicker. Indeed, such personal relationship could equally provide a motive for Judy Wicker to falsely accuse Mr. Arthur of this crime. Second, although Patricia Green testified that she provided Mr. Arthur with .22 caliber mini magnum long rifle bullets the day before the murder, the State's criminologist was unable to match such bullets with the spent shell casings recovered from the crime scene. (R.1-22-T.R. 406-07) And third, contrary to the State's assertion, the wig was found in Judy Wicker's car—not Mr. Arthur's car—and such wig was never directly linked to the crime scene. In fact, no hair was found inside the wig, *Wicker*, 433 So. 2d at 1193, and it was

only Judy Wicker who testified that Mr. Arthur wore such wig.

The State's reliance on such "significant evidence" is therefore unfounded. As the Eleventh Circuit recognized, the "affidavits of High and Melson contradict the testimony that Judy Wicker gave at trial that Arthur was with her, and would show that Arthur was about an hour away on the morning of the murder." (A47) If Messrs. High and Melson "were unwavering in their recollection" that Mr. Arthur was with them in Decatur on the morning of Troy Wicker's murder (Opp. at 12), the State of Alabama cannot seriously dispute that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup*, 513 U.S. at 327.

The State of Alabama arrives at a contrary conclusion by misconstruing *Schlup*. To establish a gateway claim of actual innocence, Mr. Arthur need not present new facts that "unquestionably establish" his innocence. *Id.* at 317. To justify a hearing to develop his gateway claim, Mr. Arthur need only demonstrate that a "showing of 'actual innocence' *may* be made out." *Id.* at 341-42 (emphasis added) (Rehnquist, C.J., dissenting). Mr. Arthur has made such a showing entitling him to a hearing. Because the Eleventh Circuit applied the wrong standard in rejecting Mr. Arthur's request, however, it arrived at the wrong result.

The State of Alabama argues that the Eleventh Circuit properly applied *Schlup*'s "more likely than not" standard instead of the "sufficiency of the evidence" standard set forth in *Jackson* v. *Virginia*, 443 U.S. 307 (1979). The State points out that the appellate court's opinion "never discussed" and "never cited *Jackson*." (Opp. at 10) Such a cursory argument, however, ignores the relevant question whether the court below actually applied *Jackson*. In fact, the Eleventh Circuit essentially concluded that Mr. Arthur failed to demonstrate that the evidence at trial was insufficient to

support his guilty verdict. Even without an explicit reference to *Jackson*, it is clear from the opinion that the Eleventh Circuit applied the "sufficiency of the evidence" standard instead of *Schlup*.

Discounting the detailed affidavits submitted by Mr. Arthur's investigator and counsel (Pet. at 10-12), the Eleventh Circuit concluded that the credibility of Mr. Arthur's alibi witnesses, Alphonso High and Ray Melson, was "fundamentally wounded by the affiants' own substantial retraction of the very content advanced to support Arthur's new alibi."[1] (A63) But the Eleventh Circuit should not have "impugn[ed] the reliability of petitioner's evidence on the ground that [the witnesses'] credibility has not been tested when the reason [their] credibility has not been tested is that petitioner's habeas proceeding has been truncated by the Court of Appeals." *Herrera* v. *Collins*, 506 U.S. 390, 445 (1993) (Blackmun, J., dissenting); *see also Martin* v. *Baldwin*, No. 99-35252, 2000 U.S. App. LEXIS 21031, at *5 (9th Cir. May 2, 2000) (where district court denied request for hearing, finding that court "improperly determined the credibility of evidence without allowing [petitioner] to fully present it").

In addition, the Eleventh Circuit concluded that due to the alibi witnesses' "substantial retraction," their "affidavits do not furnish good cause to believe that the facts, if fully developed through the discovery sought, would be any different from those found at trial." (A63) This conclusion is

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[1] In affirming the district court, the Eleventh Circuit held that Mr. Arthur was not entitled to a hearing because he failed to comply with the due diligence requirement of 28 U.S.C. § 2254(e)(2). (A51-52) In its opinion denying Mr. Arthur's petition for rehearing, the Eleventh Circuit conceded that § 2254(e)(2) is inapplicable but did not remand the case to the district court.

based on the Eleventh Circuit's implicit finding that even the "fully developed" facts regarding Mr. Arthur's alibi could not change the outcome of the trial because the evidence presented during Mr. Arthur's trial was sufficient to convict him. But *Schlup* specifically instructs that "a petitioner's showing of innocence is not insufficient solely because the trial record contained sufficient evidence to support the jury's verdict." 513 U.S. at 331. By failing to recognize that a viable *Schlup* claim can be made despite the sufficiency of the evidence to convict, the Eleventh Circuit erroneously denied Mr. Arthur's request for a hearing.

B. Under *Schlup* and *Bracy*, Mr. Arthur Is Entitled to Discovery.

The State of Alabama argues that because Mr. Arthur "has never pled specific allegations demonstrating how any of the evidence would show that he is actually innocent of killing Troy Wicker," Mr. Arthur has not shown "good cause for the discovery he seeks." (Opp. at 13) The State again misconstrues the relevant law.

In support of his gateway claim of actual innocence, Mr. Arthur seeks discovery of physical evidence that has never been subjected to DNA testing, including a rape kit, blood-stained and torn clothing, and hair samples. Based on the testimony of the State's star witness, testing of this evidence should link Mr. Arthur to the crime scene and the events leading up to Troy Wicker's murder. Such testing thus could wholly discredit the testimony of Judy Wicker—the only direct testimony linking Mr. Arthur to the murder—and demonstrate that her previous sworn testimony that someone other than Mr. Arthur shot her husband was truthful.

The State of Alabama does not dispute that DNA testing could undermine Judy Wicker's testimony, but argues that Mr. Arthur has not demonstrated "how any of the evidence would show that he is actually innocent of killing

Troy Wicker." (Opp. at 13) *Schlup*, however, does not require such showing. A petitioner need not "unquestionably establish" his innocence, and "newly presented evidence may indeed call into question the credibility of the witnesses presented at trial." *Schlup*, 513 U.S. at 317, 330 (petitioner presented affidavits to discredit testimony of two eyewitnesses who testified at his trial); *see also House* v. *Bell*, 126 S. Ct. 2064, 2078 (2006) ("If new evidence so requires, [a *Schlup* inquiry] may include consideration of the credibility of the witnesses presented at trial.") (citation omitted); *Amrine* v. *Bowersox*, 128 F.3d 1222 (8th Cir. 1997) (granting hearing to develop gateway claim of actual innocence where petitioner obtained affidavits of witnesses recanting their trial testimony and claiming that they were threatened by law enforcement officials).

Indeed, new evidence could demonstrate that Judy Wicker lied when she testified that Mr. Arthur wore a wig, rode in her car, assaulted her, ransacked her home, and shot Troy Wicker. Consistent with the testimonies of Mr. Arthur's alibi witnesses and Judy Wicker during her trial, DNA test results could show that Mr. Arthur was not with Judy Wicker during the morning of Troy Wicker's murder. Mr. Arthur's allegations provide reason to believe that he "*may*, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief." *Bracy*, 520 U.S. at 908-09 (emphasis added) (internal quotation marks omitted); *cf. Toney* v. *Gammon*, 79 F.3d 693, 700 (8th Cir. 1996) (where petitioner alleged "throughout his postconviction proceedings that he is innocent of the crime and that his counsel was ineffective," he is entitled to discovery "to prove the prejudice prong of his ineffective assistance claim").

"Where, as here, there are claims of constitutional error, there has been an advancement in DNA technology that could demonstrate a viable claim of actual innocence, and the habeas petitioner faces execution," there exists good cause for

discovery. *Cherrix* v. *Braxton*, 131 F. Supp. 2d 756, 775 (E.D. Va. 2001), *aff'd sub nom. In re Braxton*, 258 F.3d 250 (4th Cir. 2001).

II. The Eleventh Circuit Erred in Failing to Toll the Statute of Limitations.

The State of Alabama advances several arguments to oppose the application of statutory or equitable tolling to Mr. Arthur's habeas petition. None is persuasive.

First, the State of Alabama argues that in the courts below Mr. Arthur "challenged only the adequacy of the death row reading room," and made no allegations regarding the adequacy of his access to the general population library. (Opp. at 13) The State is wrong. In rejecting his statutory tolling claim, the Eleventh Circuit noted Mr. Arthur's argument that the State failed to provide him "access to an adequate law library," and held that the district court did not clearly err in finding that Mr. Arthur failed "to show that he was provided inadequate access to the prison law library." (A53, A56)

The State, however, does not dispute that Holman Prison failed to provide a list or description of books available from the general population library to death row inmates who are required to request books by title or volume, or that it utilizes a "book paging" system similar to those found to be constitutionally inadequate by other courts. (Pet. at 17-18)

Second, the State of Alabama argues that if Mr. Arthur "wanted legal representation to pursue either state or federal post-conviction relief, all he had to do was request counsel." (Opp. at 15) According to the State, in order to obtain appointed counsel in state post-conviction proceedings, a "petitioner need only fill in the form Rule 32 petition." (*Id.*) However, as noted by the Eleventh Circuit, "that form does not provide any information or questions regarding the need for appointment of counsel." (A54) Contrary to the State's

suggestion, Alabama courts have not appointed counsel to every indigent petitioner upon request. *See, e.g.*, *Dallas* v. *Haley*, 228 F. Supp. 2d 1317 (M.D. Ala. 2002).[2] Moreover, a *pro se* petitioner must first survive summary dismissal before he can request counsel. (Pet. at 19-20) To do so, his petition must include "full disclosure of the factual basis" of his claims. (*Id.* (citing ALA. R. CRIM. P. 32.6(b))) There is no allowance for an indigent death-row inmate who lacks resources to research the law or the facts.

Third, although the State of Alabama acknowledges "a possible split among the circuits in the equitable tolling standards applicable to capital cases," it opposes application of the "less than extraordinary" standard set forth in *Fahy* v. *Horn*, 240 F.3d 239 (3d Cir. 2001). (Opp. at 16-17) The State's reasoning is flawed.

The State of Alabama argues that this Court has "demonstrated a general reluctance to create dual standards for post-conviction proceedings in capital and noncapital cases." (Opp. at 19) None of the cases cited by the State, however, addresses the issue presented here: Whether a different standard should apply to toll otherwise time-barred claims of a petitioner who faces execution without *any* collateral review of his habeas petition challenging the constitutionality of his trial or death sentence.

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[2] The Circuit Court of Montgomery County did not appoint counsel for death-row petitioner Donald Dallas upon his request, despite Mr. Dallas' timely filing of a *pro se* Rule 32 petition. *Id.* at 1319. It was only after Mr. Dallas made "several requests" from his cell on death row that the trial court finally appointed counsel pursuant to Ala. R. Crim. P. R. 32.7(c). *See id.* Before counsel was appointed, however, the trial court had already dismissed certain of Mr. Dallas' claims.

The State's reliance on *Coleman* v. *Thompson*, 501 U.S. 722 (1991), is misplaced. Citing *Murray* v. *Giarratano*, 492 U.S. 1 (1989), the *Coleman* court noted that there is no constitutional right to counsel in state post-conviction proceedings for death row inmates. *See* 501 U.S. at 752. *Coleman*, however, explicitly left unanswered the question whether an exception exists to the *Giarratano* rule where state post-conviction proceedings are the first opportunity for a capital defendant, as in Mr. Arthur's case, to raise a claim of ineffective assistance of trial or appellate counsel. *See id.* at 755-56. The Court therefore has left open the possibility that a different rule may apply to a capital defendant seeking for the first time collateral review of his claims.

Fahy's "less than extraordinary" equitable tolling standard should apply here so that Mr. Arthur's claims can be reviewed on the merits for the very first time. As this Court has recognized, collateral review of convictions and sentences is integral to the death penalty appellate process. *See Giarratano*, 492 U.S. at 14 (Kennedy, J., concurring in the judgment).

CONCLUSION

For the reasons stated above and in the Petition, the Court should grant a writ of certiorari and reverse the decision of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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